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CASE AND COMMENT

TRUST—COURT'S JURISDICTION TO MODIFY—SUGGESTED REFORM

THE Law Reform Committee's Sixth Report (Cmnd. 310), which recommends that the court be given wider powers of sanctioning variations of the terms of a trust, was presented to Parliament in November, 1957. In the following month the resulting Variation of Trusts Bill, 1957, had its second reading in the House of Commons. It seems likely, therefore, that the decision of the House of Lords in *Chapman* v. *Chapman* [1954] A.C. 429, noted in [1954] C.L.J. 184–189, will soon be overturned.

As the law stands at present, the court has already wide powers to sanction dealings with the trust *property* which are not authorised by the trust instrument or by the general law of trusts; and, as a result of section 57 of the Trustee Act and section 64 of the Settled Land Act, these powers are exercisable nowadays even where there is no "emergency." But its powers to sanction modifications of the *beneficial interests* under a trust are virtually restricted to (i) a somewhat vague emergency jurisdiction which has been exercised chiefly in order to provide maintenance or advancement for infant beneficiaries (see *Chapman* v. *Chapman*, *supra*, at p. 456; and *Re Tollemache* [1903] 1 Ch. 457 at pp. 459–460); (ii) a jurisdiction to consent on behalf of infant or unborn or unascertained beneficiaries to some compromise put forward by the other beneficiaries for resolving a genuine "dispute" as to the nature or extent of the beneficial interests (*Chapman* v. *Chapman*, *supra*); (iii) certain special cases in which a wider jurisdiction exists, namely, the scheme-making jurisdiction over charitable trusts and the few cases in which jurisdiction to modify beneficial interests has been conferred by statutory provisions—one of which, according to the Court of Appeal, is section 64 of

the Settled Land Act (see *Re Downshire's Settled Estates* [1953] Ch. 218 at pp. 259–260; followed in *Re Simmons* [1956] Ch. 125, noted in [1956] C.L.J. 18–20).

The Committee's Report and the resulting Bill are concerned primarily with (ii) above; for the decision in *Chapman* v. *Chapman*, that in general nothing can be done to alter the rights of beneficiaries unless all are ascertained and *sui juris* or unless there is some dispute as to their rights, made it clear that the court's jurisdiction in this matter does not adequately meet the problems of modern times. The cogent arguments to that effect, presented so concisely and convincingly in this admirable Report, show an unanswerable case for reform.

The Bill, following the Committee's proposals, applies to all trusts of property irrespective of the date of their creation, but it does not apply to Scotland or Northern Ireland. Its operative part consists of a single clause. By subclause (1), the court is to have power to assent, on behalf of any person therein described, to "any arrangement varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts," provided that the court is of opinion that the carrying out of the arrangement would be "for the benefit of that person." The three types of "person" on whose behalf the court is to have power thus to assent are (a) any person having "directly or indirectly" a beneficial interest, whether vested or contingent, who by reason of incapacity is incapable of assenting; (b) any person who may become so entitled at a future date as falling within some specified description or class, but not (if this is what a somewhat obscure proviso signifies) if he already falls within that description or class when the matter comes before the court; (c) any person unborn. The subclause, in that it expressly includes arrangements for enlarging the powers of the trustees, seems to go further than the Report and to contemplate, for instance, extended powers of investment.

The second and third subclauses are concerned with protective trusts of the type specified in section 33 of the Trustee Act, 1925. Such trusts, it will be remembered, commonly begin with a provision for paying the income to A for a period (*e.g.*, for life) which is to end prematurely if some event happens, such as his bankruptcy, which would deprive him of it; and, on the happening of such an event, discretionary trusts come into operation in favour of a wide variety of people, usually himself and his near relatives. The Bill, following the Committee's recommendations (paras. 19, 20), proposes that where there is a protective trust for A and

nothing has yet happened to bring its discretionary trusts into operation, the court should be at liberty to assent to an "arrangement," as defined in subclause (1) above, irrespective of whether that "arrangement" is for the benefit of anyone who is merely a beneficiary under the discretionary trusts.

The remaining provisions of the Bill propose that this new jurisdiction be added also to the equity jurisdiction of the county courts for trusts of property not exceeding £500 in value; and that nothing herein is to affect trusts of property settled by Act of Parliament, nor to limit the jurisdiction which already exists by virtue of section 64 of the Settled Land Act, section 57 of the Trustee Act and section 171 (settlement of lunatic's property) of the Law of Property Act.

Incidentally, the Bill in its present form appears to ignore two of the Committee's proposals: (i) that he who created the trust should be entitled to be heard in any application to modify its terms (para. 21); (ii) that it should be made clear (para. 19) that no modification, made with the court's approval, of a protective trust will cause a forfeiture of the protected interest. The Committee's further proposal (paras. 12, 25) that section 64 of the Settled Land Act should be specifically extended in order that it may apply even where the settled property has become entirely capital money—see *Re Downshire's S.E.*, *supra*, at p. 254—seems to be adequately covered by the general provisions of the Bill.

S. J. Bailey.

INTERNATIONAL LAW—SOVEREIGN IMMUNITY—CHOSES IN ACTION—EFFECT OF CLAIM OF CONTROL

The decision of the Court of Appeal in *Nizam of Hyderabad* v. *Jung*, which was examined in an earlier issue, [1957] C.L.J. 3, has now been reversed by the House of Lords, under the name of *Rahimtoola* v. *Nizam of Hyderabad* [1957] 3 W.L.R. 884. The principal points of interest which appear from the speeches of the five Law Lords, who all agreed in allowing the appeal, were the following:—

1. There was general concurrence in the view expressed by Viscount Simonds that questions of sovereign immunity should not be made to turn upon technical points of English law. "I would deprecate," he said (at p. 890), "fine distinctions in our municipal laws in the application of international doctrine."

2. Consequently, their Lordships were agreed in rejecting, as too technical, the conclusion which the Court of Appeal drew from the view that Rahimtoola had merely acted as agent of the

Government of Pakistan in accepting the money from the Finance Minister of Hyderabad. This conclusion was that, in the circumstances, Rahimtoola was obliged to return money paid to him under a mistake of fact or in consequence of some wrongful act because, before he had accounted to his principals, the party paying such money claimed it back.

3. Instead—despite some difference of opinion as to detail—the House of Lords were agreed in holding that when Rahimtoola accepted the money, the Government of Pakistan acquired in it a legal interest the validity of which the courts were debarred from examining. Lord Simonds considered as unimportant the question whether Rahimtoola should be treated as, in the one alternative, the "organ" or "*alter ego*" of Pakistan or, in the other, as the "agent" of Pakistan; though he stated that he was, on this point, not prepared to differ from the view that Rahimtoola was to be identified with the Government of Pakistan. On the other hand, Lord Reid, with whom Lord Somervell agreed, assumed that the appellant was to be regarded as merely the agent or servant of Pakistan and did not consider it necessary to consider the question whether a High Commissioner should be treated as "the *alter ego*" of the State which he represents. Lord Cohen and Lord Denning also concluded that Rahimtoola was no more than the agent of Pakistan.

4. This difference of opinion was reflected in a divergence of view as to the exact ground on which it could be said that Pakistan was impleaded by the proceedings instituted against Rahimtoola and the Westminster Bank. Lord Simonds held (at p. 890) that Pakistan had "a legal title, which cannot be displaced by the litigation which it is entitled to decline." Lord Reid, Lord Cohen and Lord Somervell held that "Pakistan had an immediate and direct right to sue the bank in its own name for payment of this money and in that sense it had a legal title" (see Lord Reid's speech at p. 894). Lord Denning, although he held that Rahimtoola was the agent of Pakistan, refused to recognise that that gave Pakistan any legal title to the debt. Instead, as he said, he approached the matter "somewhat broadly." He expressed the view (at p. 914) that "the transaction was more in the nature of a treaty than a contract or a trust" and, therefore, that it was not properly cognisable in an English court.

5. All their Lordships (except Lord Denning, who did not deal expressly with the point) were agreed that, once proceedings against Rahimtoola were stayed, it was also necessary to stay the proceedings against the Westminster Bank. The bank, of course,

enjoyed no personal immunity. Nevertheless it was considered, for two reasons, that the action against the bank could not proceed. The first reason was that if proceedings were allowed to continue, the bank might be exposed to two attacks—one by the Nizam and the second by the Government of Pakistan, since the latter would not be bound by any order which might be made for payment to the Nizam. Secondly, since the legal title to the debt was considered to be in Pakistan "it cannot in substance be anything but grave interference with its property for a third party to sue the bank and, if the suit is successful, to recover from the bank the money to which it is normally entitled" (Lord Simonds, at p. 892).

6. As stated above, Lord Denning approached the case "somewhat broadly"—so broadly, in fact, that Lord Simonds was moved to comment on Lord Denning's opinion in these terms: "It is right that I should say that I must not be taken as assenting to his views upon a number of questions and authorities in regard to which the House has not had the benefit of the arguments of counsel or of the judgment of the courts below" (p. 893). The part of Lord Denning's speech which is most likely to give rise to future discussion is that in which he adopts, for the purpose of limiting the class of case in which a foreign State is entitled to immunity, the distinction between acts *jure imperii* and acts *jure gestionis*. In Lord Denning's words, "If the dispute brings into question, for instance the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so . . . but if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities) . . . there is no ground for granting immunity" (p. 913). No doubt Lord Denning's views in this matter may be exposed to some adverse comment. There may be some inclination to point to the difficulty of drawing a satisfactory line between the two classes of act. Equally, his observations upon the duty of the courts to refrain from the examination of the legislative transactions of a foreign government or the policy of its executive may lend themselves to misapplication outside the context of the doctrine of sovereign immunity. But, on the whole, Lord Denning's approach to the question is to be welcomed as re-affirming and filling out with detail the view that the English law is not fettered by any doctrine of the absolute immunity of foreign States.

E. LAUTERPACHT.

POST OFFICE—INTERCEPTION OF MESSAGES

TELEPHONE tapping, like the opening of letters, is a highly distasteful activity, and will not be tolerated by the public unless it is used with the utmost restraint and discretion. A large part of discretion is secrecy, and the authorities have been wise in refusing (except in very rare cases) to use intercepted messages for anything except detection. They have not normally been used as evidence in prosecutions, nor have they been disclosd to outsiders, and thus they have been kept out of the public eye. It was a sharp departure from this policy when Lord Tenby, as Home Secretary, authorised the disclosure to the Bar Council of conversations intercepted on a barrister's telephone, which were then used in public proceedings which resulted in his being disbarred. The inevitable agitation and official inquiry led to the publication of the Report of the Committee of Privy Councillors (Sir Norman Birkett (as he then was), Lord Monckton and Mr. Gordon Walker) last October (Cmnd. 283, 1957). In this valuable document the Committee unanimously condemned the former Home Secretary's action as being mistaken; they approved, by a majority, the general practice of the authorities in recent years, apart from that case, though they made some suggestions for tightening up the departmental procedure; but in a minority opinion Mr. Gordon Walker expressed himself as in favour of restricting the present scope of telephone tapping considerably, on the ground that public repugnance may weaken the general approval of the methods used by the police. Had it not been for the disclosure of intercepted messages to the Bar Council, public repugnance would no doubt be a good deal less than it now is.

Two distinct questions faced the Committee: first, what was the legal basis of the power to intercept messages; and secondly, how the power should be used. It is because Parliament has never quite made up its mind on the second question that it has allowed the first to remain in doubt, so that while no one seriously contends that the power does not exist, no one can say just whence it came. The Committee therefore devote the first part of their report to going over the same ground as the Commons' Secret Committee of 1844 which reported on the interception of letters at the time of the Mazzini affair. At that time the public records were searched and the abstract of nearly a hundred pages, annexed to the Report of 1844, sheds much light on the early history of the Post Office, which as a public service dates from the time of the Commonwealth. But all it reveals in the enacted law is that the Post Office Acts, from 1710 to 1953 (s. 58) have provided in

more or less similar terms that improper tampering with postal packets should be an offence, unless done "in obedience to an express warrant in writing under the hand of a Secretary of State," and that Cromwell's original Ordinance of 1657 recited that a General Post Office "was the best means to discover and prevent many dangerous and wicked designs . . . against the peace and welfare of the Commonwealth." The statutes have simply taken it for granted that control of the posts automatically gave power to pry into the affairs of those who used them. The Committee of 1957, like that of 1844, accepted this assumption. They were satisfied that the power to intercept letters and telegrams existed, and that it must logically extend to telephone messages; and they preferred to argue by analogy from letters and telegrams than to allow that telephonic interception had some special legal basis of its own. They point out that the position has been further strengthened since 1947, for the Crown Proceedings Act, section 9 (1) has imposed a sweeping prohibition on actions in tort against the Crown and its officers for things done or omitted in relation to postal or telephone communications. All powers of interception thus derive, in the Committee's view, from the early power to open letters which was recognised repeatedly in the Post Office statutes.

Those statutes are, indeed, virtually conclusive. But in any case, one is tempted to ask, need the Crown here be invested with any *power* at all? A legal power is the ability to do something which would otherwise be impossible or wrongful. It is easy enough for the Post Office to open letters, and what manner of wrong do they commit by doing so? We have recently been reminded that Post Office services are not contractual (*Treifus & Co. Ltd.* v. *Post Office* [1957] 2 Q.B. 352, noted in [1957] C.L.J. 113) and it might well be that its officers in inspecting correspondence committed no tort or breach of bailment, even before the Crown Proceedings Act barred actions in tort. This line of reasoning applies even more aptly to the case of the telephone, where there would seem to be no peg whatever on which to hang the action. Such indeed was the official Post Office view, for until 1937 interceptions were not even authorised by warrant; any telephone operator, it was thought, might lawfully intercept messages. In 1937 it was thought right to restrict interception to cases authorised by the Home Secretary's warrant, but this was a change of administrative policy and had no legal motive. Although the Committee prefer to rely upon the Post Office statutes, the argument that interception is legal *per se* is a strong second string.

The exercise of this power is another matter. Telephones are easy to tap, and applications for warrants by the Metropolitan Police and the Board of Customs and Excise have been multiplying in recent years. In 1951 the Home Office laid down certain principles for confining the practice to "really serious" cases, where normal methods of investigation failed and interception was likely to result in a conviction. It was also their policy to use interception for detection only, rather than as a source of evidence, although the Report cites exceptional cases where use was made of it in a police disciplinary inquiry (para. 99) and in courts of law (para. 149). Furthermore, apart from the security service, interception is resorted to only where there is ground for suspecting serious crime. The Committee were clear that the use of intercepted material should be confined to the purposes for which the warrant was issued in the first place, and that there should be no disclosure to private individuals, private bodies or domestic tribunals of any kind whatsoever. The Home Office's usual practice accords with these rules, and Lord Tenby departed from it only because he regarded the case as exceptional in view of the importance of the integrity of the Bar in the administration of justice.

The statistics published by the Committee of 1844 recorded a few examples of letter-opening in cases of absconding debtors and bankruptcy, but that Committee said in their Report that some of the old instances would in their time be considered highly objectionable. The modern practice was rightly made much more strict, long before the Home Office instructions of 1951 said that this "exceptional method" was "inherently objectionable" and "must be used with great caution." Subject to these limits, and to the Committee's own detailed recommendations, most people will agree with the majority's conclusion that to abandon interception altogether would be a gratuitous addition to the facilities for crime, without any countervailing advantage to the community. Mr. Gordon Walker, on the other hand, takes the view that the number of detections secured by interceptions is so small, and the objections to the method are so great, that it ought to be abjured except in cases of serious emergency, for example, for capturing a dangerous criminal or lunatic. He criticises the postal interceptions aimed against lotteries and obscene matter, which in fact were discontinued in 1953 because of the very same scruples which he feels. This stricter policy was also discussed in the reports and debates of 1844, but the argument against it is that it can do nothing but harm to advertise that the Post Office services are available for nefarious use. It is very desirable that persons living on the wrong side of the law should not be publicly assured

that the police will turn a blind eye, or ear, to their messages. Underlying the whole subject is the doctrine that the police have power to possess themselves of any evidence required for a prosecution, and if that justifies their entry on private property it is difficult to refuse them power to listen in on the telephone. Everything, however, depends on wisdom and restraint in practice, and by their criticism and suggestions the Committee have rendered an important service.

H. W. R. Wade.

CRIMINAL LAW—JURY—PRAYING A TALES

Did the shades of Thomas Groffin, chemist, and Richard Upwitch, grocer, haunt the Court of Criminal Appeal last November when the case of *R.* v. *Solomon* [1958] 1 Q.B. 203 came to be decided? The appellant had been convicted at Brighton Quarter Sessions for larceny. When his case came on for trial, it was found that the jurors summoned to attend the sessions had been inadvertently released. Thereupon the clerk of the peace sent out and secured the attendance of twelve individuals who happened to be nearby. The report speaks of the clerk praying a *tales de circumstantibus*, though there appears to be no written evidence that the court ordered this move. However, the appellant's counsel being informed offered no objection and in the event the appellant was convicted by this jury.

The Court (Lord Goddard C.J., Gorman and Pearson JJ.) allowed his appeal. It appears exceedingly doubtful whether all the jurors, or even a majority of them, were qualified for jury service, but the court grounded its decision on the invalidity of the process followed. The question fell to be decided by the common law because the existing statutory provisions for supplying the places of absent jurors do not apply to Quarter Sessions; and, said Lord Goddard, "the common law seems to be somewhat obscure on the subject." The court referred to such authorities as Hale, Blackstone, and Hawkins, *Pleas of the Crown*, and found that the law did not recognise a complete jury of talesmen. Jurors must be summoned on the precept to the sheriff, who gives the court a panel of jurors summoned. "If there is a defect in the jury, that is to say, if a full jury cannot be empanelled from the names on the panel, a tales can be prayed." But, said the court, "one cannot have a jury composed entirely of talesmen because the very fact that it is a tales implies that there must be a quales." Where there is a complete defect of jurors the proper course is to require a fresh panel to be empanelled *instanter*. The Brighton

jury being therefore legally incompetent, their verdict was a nullity and set aside. A *venire de novo* was ordered for a trial of the appellant on the original charge.

Had Serjeant Buzfuz been present as *amicus curiae* he might have referred the court to a book of practice very popular a couple of hundred years ago, Duncomb's *Trials per pais*, where at pp. 83, 85 (8th ed., 1766) the rule is clearly stated that " the principal Panel must stand, or else there can be no Tales." This is because " Tales [and Quales] are words similitudinary " and so if the whole array of jurors be quashed or all the jurors challenged and after examination discharged " no Tales shall be awarded, for there are not Quales; but in such a case a new Venire facias shall be awarded. But if at the time of granting the Tales, the principal Panel stand, and afterwards is quashed as aforesaid, yet the Tales shall stand; for it sufficeth if there were Quales at the time of granting the Tales." A case of 1684 at Buckinghamshire Assizes is quoted where Montague C.B. granted a tales when only one juror appeared and was challenged. After the tales had been granted but not before, the juror was set aside.

The common law rule now stands securely established under a modern precedent and lawyers will no doubt feel grateful to the appellant for providing the occasion. Whether the feeling of gratitude will be reciprocated is perhaps more questionable, since the appellant returns to Brighton to face his trial in which it may be that in case of conviction " an extraordinary lenient sentence " (as Lord Goddard called it) will not be repeated.

D. E. C. Yale.

CRIMINAL LAW—LARCENY—INTENT TO DEPRIVE

In *Russell* v. *Smith* [1957] 3 W.L.R. 515 the accused was a lorry driver. He was given a number of full sacks to take and deliver to someone else. By mistake he was given eight sacks too many. He did not discover this until he had unloaded the right quantity of sacks, when he found that he had eight over. He took them away and sold them and kept the money for himself. He was prosecuted for the larceny of the sacks and in the magistrates' court he was acquitted; but on appeal by the prosecution by way of case stated the Divisional Court (Lord Goddard C.J., Slade and Gorman JJ.) reversed this decision and remitted the case to the magistrates with a direction to convict.

This is but the latest of a long series of decisions which make one despair of knowing what the law of larceny is. Section 1 (1) of the Larceny Act, 1916, in defining stealing repeats the common

law requirement that the intent to deprive shall be at the time of the taking. In this case the physical act of taking occurred when the accused originally drove off with the whole assignment including these eight sacks, in order to deliver them to the consignee; and at that time he had no fraudulent intent, because neither he nor anyone else knew that there were eight sacks too many. The courts, however, have made it clear that they are not content to regard the physical act as the sole criterion of what amounts to a taking; but ever since the case of *R.* v. *Ashwell* (1885) 16 Q.B.D. 190, where the court of fourteen judges was evenly divided, they have found it increasingly difficult to say what other criterion is to be substituted. In *R.* v. *Hudson* [1943] K.B. 458 the mental element was emphasised. The prisoner had innocently received through the post a cheque which was not intended for him, but it was some days before he opened the envelope and discovered the cheque inside. He then decided fraudulently to appropriate it and it was held that he at that moment became guilty of larceny. But in *Moynes* v. *Coopper* [1956] 1 Q.B. 439, noted in [1956] C.L.J. 161, a pay-clerk miscalculated the amount which the prisoner should receive and put too much into his pay-packet. When he discovered the excess, he decided to keep it and the court held that he was not guilty of larceny. In *Russell* v. *Smith* the court was faced with the unenviable task of reconciling *R.* v. *Hudson* with *Moynes* v. *Coopper*. The point of distinction which the court appears to have discovered is that in *Moynes* v. *Coopper* the pay-clerk intended to put £6 into the pay-packet and intended the prisoner to receive £6, though the intention was the result of a miscalculation, whereas in *R.* v. *Hudson* the cheque was never intended for the prisoner at all.

Russell v. *Smith* is certainly on the facts nearer to *R.* v. *Hudson* than it is to *Moynes* v. *Coopper*. But the whole position is highly unsatisfactory and only legislation can now get us out of the confusion into which we have fallen. Surely the truth is that the courts for many years have been over-anxious to convict dishonest persons and instead of leaving it to Parliament, if the public weal really demands action, to extend the scope of the criminal law they have strained the law in order to enmesh those who, although dishonest, have not brought themselves within the plain scope of the Larceny Act. It is doubtful whether any such extension is really required; but a restatement of the law, which only Parliament can now give, is long overdue. There are plenty of defects in the Larceny Act itself which could well be remedied at the same time.

E. Garth Moore.

CONFLICT OF LAWS—COMMON LAW MARRIAGE—DISPLACED PERSONS

It is well established in the English conflict of laws that the formal validity of acts is determined by the *lex loci actus*. As regards contracts this principle does not operate rigidly, and compliance with the proper law is equally sufficient, while dispositions affecting immovable property must observe the formalities of the *lex situs*. The history of these rules and the question whether compliance with the *lex loci actus* is imperative or facultative has been examined by a number of writers, who have, on the whole, come to the conclusion that neither history nor convenience require the inflexible application of the *lex loci actus*. Even as regards the form of a marriage, modern Continental systems have taken a broad view. While insisting upon the application of their own law, if the marriage is celebrated within the country, they do not demand imperatively that the *lex loci celebrationis* be observed, if the marriage is celebrated abroad, and they are satisfied if the marriage is celebrated in accordance with the personal law of the parties.

English conflict of laws has hitherto assumed a more inflexible attitude. Apart from statute, a marriage celebrated abroad is only valid in form if celebrated in accordance with the *lex loci*, unless the local law does not provide for the celebration of a monogamous Christian marriage, or unless at least one of the parties is a member of an occupying British force, when marriage in common law form suffices.

In *Taczanowska* v. *Taczanowski* [1957] 3 W.L.R. 141, noted in [1957] C.L.J. 126, the Court of Appeal extended the exception to foreign forces not operating under British command, while indicating that it would be impracticable to rely on the personal law as an alternative. Following this decision, Sachs J. in *Kochanski* v. *Kochanska* [1957] 3 W.L.R. 619 held that a religious marriage concluded in 1945 between two Poles, inmates of a Polish displaced persons' camp in Germany which was organised on para-military lines, but was not subject to the discipline of any military force of occupation, was valid as a common law marriage, although it was invalid in form according to German law. The decision is expressly confined to marriages between members of an organised community which finds itself in an unusual position, and does not purport to lay down a principle which is also applicable to marriages of individuals not so circumstanced.

Kochanski v. *Kochanska*, and the decision which it follows, are based on the assumption that the *lex loci celebrationis* is normally applicable because the parties are presumed to have

submitted to that law. Consequently, it is argued, evidence showing that the parties did not wish to submit to that law rebuts the presumption. It remains to examine, first, whether this assumption is correct, and secondly, whether in these circumstances compliance with common law form is either necessary or admissible.

Both the rule that the *lex loci celebrationis* applies imperatively (*Scrimshire* v. *Scrimshire* (1752) 2 Hag.Con. 395, 408, 412, 416, 417, followed during the nineteenth century and more recently in *Berthiaume* v. *Dastous* [1930] A.C. 79, 83) and the exception allowing an exemption therefrom in favour of British military forces of occupation (*Ruding* v. *Smith* (1821) 2 Hag.Con. 371, 381, 386, 391; *R.* v. *Inhabitants of Brampton* (1808) 10 East 282) do in fact proceed from the premise that the *lex loci celebrationis* applies in virtue of submission. However, it must be remembered that, at the time when *Scrimshire* v. *Scrimshire* was decided, the contractual view of marriage prevailed in the conflict of laws, both as to the form of the ceremony and the absence of the requisite parental consent. Moreover, as Sir Edward Simpson pointed out (at p. 412), "it is not in the power of one of the parties . . . to draw the question of the marriage contract *ad aliud examen* to be tried by different laws than those of the place where the parties contracted." In short, even when the contractual view of marriage prevailed, the autonomy of the parties was restricted. They could select the place of marriage and thus indirectly the law governing the marriage ceremony (*Warrender* v. *Warrender* (1835) 2 Cl. & F. 488, 530), but they could not select a law other than that of the place of marriage.

Members of a military force of occupation are exempt from the operation of local law in virtue of the status of the force under international law (see *Communicazioni e Studi*, Vol. 4 (1952) 117–141), but not as a result of a collective or individual act of non-submission. Instead, its members may resort to the facilities of the local law, if they feel so inclined, but there is a presumption to the contrary.

A common law marriage was the universal form of marriage before the Reformation, but subsequently the forms of marriage assumed a local character. Consequently, the common law marriage became a subsidiary form of marriage for those whose personal law was English or was based on English law, if the statutory provisions of English law and of the *lex loci celebrationis* were inapplicable. Henceforth it does not appear that any attempt was made to treat a common law marriage as a subsidiary form of marriage of universal validity until 1950, when the courts in Australia began to consider this alternative with various degrees

of enthusiasm (*Savenis* v. *Savenis* (1950) S.A.S.R. 309; *Fokas* v. *Fokas* (1952) S.A.S.R. 152; *Maksymec* v. *Maksymec* (1954) 72 W.N. (N.S.W.) 522). Such an extension, in disregard of the subsidiary provisions established by the personal law of the parties or of the military force with which they are serving, will not necessarily operate *in favorem matrimonii* since the parties are normally conversant with the form sanctioned by their personal law or by the law governing the military unit. Reliance upon the latter may require a cumulation of laws and thus of marriage ceremonies, but this difficulty is usually taken into consideration by the parties themselves.

K. Lipstein.

CONFLICT OF LAWS—WINDING UP OF FOREIGN COMPANY

Forty years after the dissolution of the Russian banks and twenty-five years after the inception of litigation in England to determine whether the English branches of such banks must be wound up, how they are to be wound up, whether they revive for that purpose, when jurisdiction to wind up may be exercised, whether the revived branch is liable for debts incurred since the dissolution abroad, whether the assets in England have become *bona vacantia* and whether foreign creditors may participate in the liquidation proceedings, the Russian bank cases are reaching their allotted span with the question whether the contributories are entitled to share in the distribution. After some tentative pronouncements by Wynn-Parry J. (*Re Banque Industrielle de Moscou* [1952] 2 All E.R. 532, 534; *Re Azoff-Don Commercial Bank* [1954] Ch. 315, 325), Roxburgh J. gave an affirmative answer in *Re Banque des Marchands de Moscou* (*Koupetschesky*) [1958] Ch. 182. This conclusion follows naturally from the principle, established in 1936, that for the purpose of winding up the company is revived, and it is unnecessary to resort to the strained analogy drawn from the Joint Stock Companies Winding-Up Act, 1848, which applied to the special type of unlimited liability company incorporated under the Act of 1844. The only remaining question was whether, in the peculiar circumstances of the Russian nationalisation, any former shareholders could establish title to the assets in England. This was primarily a matter of Russian law. Unfortunately the evidence of the single expert called by a claimant remained unchallenged, and the court was thus virtually compelled to accept it. According to the evidence, the effect of the Soviet decrees of 1917 and 1918 was to expropriate the assets of the banks in Russia, without dissolving the latter immediately and without ever transferring the

rights of the shareholders as such to the State, and to make the shareholders common owners of the remaining assets upon the final dissolution of the banks. This conclusion stands and falls with the assertion that the Russian nationalisation decrees did not purport to transfer or extinguish the rights of shareholders anywhere in the world. It contrasts strangely with the wording of the decrees which required the delivery up to the State of all share certificates and declared all outstanding shares to be void, read in conjunction with the expert's own view that the share certificates were documents of title of a legal nature. In so holding, the expert seems to have indicated that, in accordance with the usual Continental practice, the shares were bearer shares. If the decrees purported to invalidate or to transfer them as well, it is clear that the decrees failed to have this effect upon shares held outside Russia, while they did so in respect of any shares situated inside Russia, irrespective of the residence or nationality of the owners and of Tsarist company law which vested the remaining assets in all the shareholders as co-owners. This point is important, for the proper inference from the expert's statement appears to be that all persons who were shareholders in 1917, their successors and assignees, are entitled to share in the distribution of the English assets and that the assets must be distributed among those who present themselves as co-owners. Upon the alternative interpretation only those can participate who produce share certificates, subject possibly to the additional restriction that the shares were situated outside Russia at the time when the nationalisation decrees were passed (*cf.* Dicey, *Conflict of Laws*, 7th ed., pp. 664–665), but they can only claim a share in the assets which is proportionate to the relation of their shareholdings to the share capital as a whole.

K. Lipstein.

CONFLICT OF LAWS—RECOGNITION OF FOREIGN DIVORCE

Hardship must often result from a refusal to recognise a foreign divorce. Yet so long as the basis of divorce jurisdiction varies from country to country there is clearly a risk of such refusal; but the risk is reduced if the court which is asked to grant recognition has regard to the factual circumstances in which the foreign court acted. *Robinson-Scott* v. *Robinson-Scott* [1957] 3 W.L.R. 842 therefore marks a fresh advance in a branch of the law where a significant development had already taken place only four years earlier.

Domicile has been the common law's traditional criterion of

divorce jurisdiction, both for itself and others. "The domicile for the time being of the married pair," declared the Privy Council in *Le Mesurier* v. *Le Mesurier* [1895] A.C. 517, "affords the only true test of jurisdiction to dissolve their marriage." Recognition was thus accorded only to a divorce granted (or recognised: *Armitage* v. *Attorney-General* [1906] P. 135) by the country of the parties' domicile.

For so long as domicile remained the exclusive test of the English court's own jurisdiction, this position was entirely logical. But since 1937 statutory encroachments on the principle have been made, conferring jurisdiction on our own court where certain alternative requirements are satisfied; and thereafter recognition could scarcely be withheld from foreign decrees founded on similar assumptions of jurisdiction. Hence in *Travers* v. *Holley* [1953] P. 246 the Court of Appeal was constrained to recognise a New South Wales decree based on a provision corresponding to section 13 of our Matrimonial Causes Act, 1937. The court admitted that the *Le Mesurier* rule had now to be interpreted in the light of our domestic litigation, for "where there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which *mutatis mutandis* they claim for themselves" (*per* Hodson L.J. at p. 257).

The situation in the *Robinson-Scott* case did not at first sight fall within this new principle. The husband, whose domicile throughout was English, had been married in Zurich to a Swiss lady who was then domiciled in the canton of Zurich. After a short honeymoon in Switzerland the husband returned to London, but his wife decided to remain in Switzerland. Six months later she instituted proceedings in the District Court of Zurich and was eventually granted a divorce. The husband sought a declaration that his marriage had been validly dissolved by the Swiss decree.

The difficulty was that the Zurich court had founded its jurisdiction on the wife's domicile in that canton, there being nothing in the Swiss Civil Code to prevent a woman retaining her own separate domicile after marriage. In English law however a married woman automatically takes her husband's domicile; and it has long been established that only the English concept of domicile can be applied by English courts.

Here then was a situation where a divorce had been granted neither on the basis of domicile (in the only recognised sense) nor on that of any ground corresponding to our own statutory assumptions of jurisdiction. Nevertheless the fact was that the wife had resided in Zurich for a period of three years immediately

before the commencement of proceedings and had thus fulfilled a qualification which in this country would have given our court jurisdiction under the Matrimonial Causes Act, 1950, s. 18 (1) (*b*).

The question, therefore, was whether the English court could look at the reality of the situation and say: here is a case where we would in fact have had jurisdiction ourselves and so must recognise the decree; or whether the court must have regard to the grounds on which the foreign court actually founded its jurisdiction and say: this is not a ground which would have given jurisdiction in England and so we must withhold recognition.

Karminski J. confessed that he was without the guidance of direct authority. But happily academic advice was to hand. Writing in 1951 Dean Erwin Griswold of the Harvard Law School had foreseen such a situation ("if the heavy hand of the *Le Mesurier* case can be lifted") and had suggested the former approach. This was adopted. It was not necessary, Karminski J. concluded, that the foreign court should actually found its jurisdiction on a ground corresponding to our own, provided facts existed which would have enabled an English court to act. So the substance was preferred to the form, and the Swiss divorce was recognised.

J. C. Hall.

CONTRACT ILLEGAL BY FOREIGN LAW—WHETHER ENFORCEABLE IN ENGLAND

In *Regazzoni* v. *K. C. Sethia (1944) Ltd.* [1957] 3 W.L.R. 752 the House of Lords, unanimously affirming the decision of the Court of Appeal noted in [1956] C.L.J. 141, declined to enforce a contract for the sale and delivery of jute bags when it was clear from the evidence, though not on the face of the contract, that it was intended to ship the bags from India to South Africa in violation of Indian law.

The decision turned mainly upon the limits of what may be called the rule in *Foster* v. *Driscoll* [1929] 1 K.B. 470, that an English court will not enforce a contract if its performance will involve the doing of an act in a foreign and friendly State which violates the law of that State; and the decision of the court below that this case fell squarely within that rule was affirmed. In the Court of Appeal, however, the rule had been stated in wide terms as one applicable generally to cases where "one of the parties to the knowledge of the other, intends to break or to assist in breaking the laws of a friendly country or to get some one else to do it" (*per* Denning L.J.). But in the House of Lords the statements

of the rule are limited to the case where there is an intention not only to violate foreign law but to commit an illegal act within the territory of the foreign State. A different conclusion might be reached, said Viscount Simonds, "if the law of the contract is English and the contract can be wholly performed in England, or at least in some other country than that where the law makes the act illegal." The same limitation was put positively by Lord Reid when he said the crucial fact was that "both parties knew the contract could not be performed without the respondents procuring a breach of the law of India within the territory of that country." And again he said: "this case does not, in my view, involve the enforcement of Indian law in England."

The appellant had attempted to stem the effect of the rule in *Foster* v. *Driscoll* by calling in aid the well-known rule about foreign penal and revenue laws; and indeed a recent decision of their Lordships in *Government of India* v. *Taylor* [1955] A.C. 491 had, as Viscount Simonds put it in the present case, "showed beyond all shadow of doubt that an English court will not enforce the penal or revenue laws of another country at the suit of that country." It did not follow, however, that in a suit between private persons the court would enforce a contract which involved the doing in a foreign country of an act illegal by the law of that country. "For an English court," said Viscount Simonds, "will not enforce a penal law at the suit of a foreign State, yet it would be surprising if it would enforce a contract which required the commission of a crime in that State." Thus the tables were completely turned on the appellant, for in the result it was the rule in *Foster* v. *Driscoll* which ousted the rule about foreign penal or revenue laws. Their Lordships did not find it necessary, therefore, to decide whether the Indian law was indeed a "penal law."

R. Y. Jennings.

CONTRACT—ILLEGALITY—FALSE REPRESENTATION

Brown Jenkinson & Co. Ltd. v. *Percy Dalton (London) Ltd.* [1957] 3 W.L.R. 403 is an interesting illustration of the difficulties that can arise in the application of the simple-sounding principle: "an agreement is illegal and unenforceable if it has as its object the commission of a tort."

D sold 100 barrels of orange juice to V. They were to be shipped from London on instructions given by V; payment was to be made by V's bank in Rotterdam against the production of the shipping documents. As bankers are not inclined to advance money except

on clean bills of lading, V told D that clean bills would be required. When D delivered the barrels to P (as agent for the shipping line) it was apparent that they were old and frail and that liquid was seeping between the seams, but, as D required clean bills of lading, P issued bills recording that the barrels were "shipped in apparent good order and condition." D entered into a written agreement to indemnify the shipowners or their representatives against all loss or damage arising from the issue of clean bills. On delivery of the barrels in Hamburg it was discovered that a considerable quantity of the orange juice had been lost through leakage. A claim was made against the shipowners and this was satisfied. The shipowners, through P, claimed indemnity from D under his agreement.

D refused to pay, pleading that the agreement to indemnify was illegal as it had as its object the making by the shipowners (through P) of a fraudulent misrepresentation. As Morris L.J. said, the plea came with singular ill grace from those at whose request the procedure at the time of shipment was adopted, who were prepared to condemn their own conduct in order to save their own pocket. But the legal issue had to be determined and Morris and Pearce L.JJ., allowing D's appeal from the county court, found that the agreement to indemnify was illegal and unenforceable. P had made a representation of fact that the barrels were shipped in apparent good order and condition, the representation was false, he knew it was false, he made it with intent that it should be relied upon by bankers and indorsees of the bill, it was in fact relied upon in that payment was made on it, and loss was caused or at any rate could have been caused. Although the loss was subsequently made good, and P did not intend or contemplate that anyone would ultimately be defrauded, all the elements of deceit was present (*cf. Polhill* v. *Walter* (1832) 3 B. & Ad. 114) and P was seeking to recover on the indemnity in consideration of which the tort had been committed. It was true that in the previous twenty years it had become customary, as a matter of commercial convenience, to give clean bills of lading against an indemnity from the shippers in cases where there was a bona fide dispute as to the condition or packing of goods, but in this case there had been "a slipshod and unthinking extension of a known commercial practice to a point at which it constituted fraud in law." Accepting this, Morris and Pearce L.JJ. felt, with some reluctance, that they must apply the familiar rule stated by Lord Mansfield in *Holman* v. *Johnson* (1775) 1 Cowp. 341, 343: "the principle of public policy is this: *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action

upon an immoral or illegal act" (*cf. Alexander* v. *Rayson* [1936] 1 K.B. 169, 182). It was true that in none of the cases cited to the court had a plaintiff failed where he was not fraudulently minded, but was "merely reckless and unthinking in committing a tort of deceit instigated by the defendant," but on the other hand no case had been cited where a plaintiff had succeeded in such circumstances. Accordingly, in the words of Pearce L.J., the plaintiffs' rather haphazard belief that no one would ultimately be defrauded, though it affected their merits, did not improve their legal position.

After much hesitation, Lord Evershed M.R. reached a different conclusion. "I have failed" he said "to find any case (apart from those involving immorality or public illegality) in which, upon the principle *ex turpi causa non oritur actio*, a plaintiff has been cast from the judgment seat who has not been found personally dishonest." In this case the statement had been made in accordance with a practice that was common and well known in the trade and with an intention that any consequences should be covered by the plaintiffs' or their principals' liability to make compensation. In his judgment, the result was not one which required the court upon grounds of public policy to deny to the plaintiffs their right to sue. This is the crux of the whole matter. How, in such a case, are the requirements of public policy to be reconciled with those of commercial convenience? How are the merits of a business dispute to be balanced against the generality of a legal principle which, as Lord Shaw of Dunfermline might have said, derives much of its plausibility from its Latin formulation?

In result, the claim to indemnity failed. No order was made as to costs in respect either of the proceedings in the Court of Appeal or in the county court. Leave to appeal to the House of Lords was granted, no doubt with alacrity. Dr. Cheshire and Mr. Fifoot (*Law of Contract*, 4th ed., 302) and Mr. J. K. Grodecki (71 L.Q.R. 254) have drawn attention to the need for reconsideration by the House of Lords of certain aspects of the law of illegality. The opinions of the House on the points raised in the present case are no less urgently needed.

F. J. Odgers.

CONTRACT—RESTRAINT OF TRADE—TERMINABILITY

Contracts in restraint of trade were said by Younger L.J. in *Attwood* v. *Lamont* [1920] 3 K.B. 571 to constitute "a branch of the law which has at all times been peculiarly susceptible to

influence from current views of public policy." That influence is certainly present in the decision in *Kores Manufacturing Co. Ltd.* v. *Kolok Manufacturing Co. Ltd.* [1957] 1 W.L.R. 1012, where the law applicable to contracts *by* servants found a new application in a contract regulating the employment *of* servants.

The plaintiff and defendant companies were rival manufacturers of carbon papers and typewriter ribbons. Since 1934 they had occupied adjacent premises. Probably fearing the disruptive effect of competing for each other's labour each contracted not, without the written consent of the other, at any time to employ any person employed by the other during the previous five years. The agreement was invoked on three occasions to prevent employment contrary to its terms—twice to restrain the plaintiffs, once the defendants. In the light of new events the agreement was treated flexibly. During the war, when labour was subject to ministerial direction, the parties in their own interest waived its terms, and in 1955, when planning to move their main factory, the plaintiffs offered to allow their women employees to transfer freely to the defendants.

In 1957, however, the plaintiffs' chief chemist wished to transfer to the defendants' employment. The plaintiffs sought a declaration that the contract was valid, and an injunction restraining the defendants from employing the chemist or any other person who during the previous five years had worked for the plaintiffs.

In deciding whether contracts in restraint of trade are valid the courts have observed two tests—whether the contract is reasonable in the interest of the parties, or, as was formerly thought, reasonably necessary for the protection of the promisee, and whether it is reasonable in the interests of the public. Since *Nordenfelt* v. *Maxim Nordenfelt Gun and Ammunition Co.* [1894] A.C. 535 the former test has certainly been applied more stringently in contracts of service than in the sale of an established business. Merely to restrain competition is not allowed; but if the master can show "a proprietary interest," he may check the dissemination of trade secrets and the unfair use of lists of customers.

Although this agreement was superficially not between master and servant, its effect was clearly to restrict employees in their prospects of future employment. It was therefore pertinent to consider whether in preventing competition over labour there was a proprietary interest which could reasonably be protected, and by what terms; and secondly, as a question of public policy, whether the substance of the agreement was reasonable in its effect upon employees, although they were strangers to the contract.

Lloyd-Jacob J. assumed without deciding that there was here

a business interest which could be protected. As between the parties, it might seem reasonable that arrangements of this sort should be the subject of a valid contract, and to that extent it may be necessary to define, as a new head, the substance of what may be restrained, which differs from that in contracts of service or for the sale of goodwill, or between trade associations. But five years was here held to be longer than was necessary for the protection sought. The period must be adequate for its purpose and no more; so that where substantial companies dealing at arm's length make the identical promise, that promise may still be declared void in the interests of one of the parties. This cuts through the generalisation that, between commercial men, the courts will accept as reasonable the restrictions upon which they have agreed.

The contract failed also because it offended against the public interest. The court has to concern itself, the learned judge said, not with what does happen but with what might happen under such an agreement. If one of the parties wished to offer work which was both suitable and near at hand to former employees of the other, they might have to be rejected merely because of their faithful service to their previous employer. This would bring about "disastrous consequences to the community."

Another point was that the contract contained no provision for its determination, and so presented the same problem as in *Martin Baker Aircraft Co. Ltd.* v. *Canadian Flight Equipment Ltd.* [1955] 2 Q.B. 556, noted in [1956] C.L.J. 9. On the principle that the court seeks to give business efficacy to a contract which in terms is silent as to its duration, the learned judge held that the contract was determinable by either party on twelve months' notice. The circumstances in which it was made, and the parties' willingness to modify it from time to time, were all indications that the restrictions were not intended to last for ever. Had they not been condemned on more general grounds, they could therefore have been avoided at fairly short notice.

G. Slynn.

Contract—Description of Goods—Whether Condition

In a recent note in this Journal ([1957] C.L.J. 12) attention was drawn to the unsatisfactory character of some of the concepts employed in the law of contract, and also to the use of the word "condition." It was submitted that legal use of that word obscured vision of the existence of the important concept of "definition of goods," with the result that there was failure to

distinguish " between (i) promises to deliver and accept the defined contract goods, and (ii) ' conditions ' affecting the performance of these promises." The case of *Oscar Chess Ltd.* v. *Williams* [1957] 1 W.L.R. 370 illustrates a confusion between " promise " and " condition " in a situation where there was no suggestion that the characteristic in question was part of the definition of the contract goods.

Once again we are concerned with motor-cars, and we can simplify without falsifying by describing the transaction as one where the defendant sold a Morris car in part exchange for a new car. The buyer thought it was a 1948 model and allowed £290 for it. It was in fact a 1939 model for which the allowance should have been £175. The registration book showed it as first registered in 1948, but " someone far back in 1948 must have fraudulently altered the log book." The defendant who thought it was a 1948 model described it as such, and the case turned on the legal effect of his statement. The evidence was very short, and can be set out in full. The plaintiff's agent said in examination-in-chief: " He offered me a 1948 10 h.p. Morris car in part exchange. He produced the registration book." In cross-examination he said: " I had often had lifts in the defendant's car. I thought it looked like a 1948 model. I checked up in the registration book." His evidence was accepted: the defendant did not go into the witness box. The plaintiff claimed as damages £115 (the difference between £290 and £175), alleging that there had been a breach of condition or, in the alternative, a breach of warranty. The county court judge held that the assumption that the car was a 1948 model was " fundamental to the contract," and that in consequence the plaintiff succeeded. In the Court of Appeal the majority (Denning and Hodson L.JJ.) held that the statement that the car was a 1948 car was not a term of the contract, and accordingly the plaintiff must fail. Morris L.J. dissented, holding that the statement was " a stipulation of the contract which was a condition."

The presupposition of both the majority and minority judgments is that if the statement was a term of the contract, then the plaintiff had to recover. It is this which calls for examination. This presupposition stems from the terminology according to which the " terms of a contract " are either " conditions " or " warranties."

The case may be analysed in accordance with the concepts propounded in an article on " Conditions, Warranties and other Contractual Terms " (1937) 15 Can.B.R. 309. In that article a distinction is drawn between " promises " and " conditions," and the terminology is rejected which Williston in Art. 665 of the first

edition of his *Contracts* so rightly castigated as one of the principal sources of confusion in the law of contract, *viz.*, that whereby the word "condition" is used to signify a kind of promise. The elements of a contract are promises—"undertakings by a promisor to act or forbear in some specified way in the future." But some undertakings may be conditional on some event. "In a promise to accept a horse provided it is sound the quality of soundness operates by way of condition." The promise as a whole contains the reference to the soundness of the horse, but it is convenient to detach that reference from the promise, to consider it by itself, and to call it a "condition." It is also convenient to refer to the remainder of the promise as stating the undertaking in the promise. Thus a condition is a term of contract, which is part only of a promise, and sets out events which must exist in order that the promisor be legally bound to carry out his undertaking. If the events are past or present ones and do not exist, or if they are future ones and do not come to pass, then the promisor is not bound to do anything. By doing nothing he performs his actual conditional promise. The promisor who has promised to accept a horse, provided it is sound, performs his promises when he rejects an unsound horse. He could perform his promise also by accepting the unsound horse, for a promisor may waive the benefit of a condition annexed to his undertaking.

The problem before the court was that of categorising the statement that the Morris car was a 1948 model. It might have been an innocent misrepresentation having no operation other than giving rise to a right to rescind, or it might have been a term of the contract. But as a term of the contract it might have operated in one of three ways: (i) as part of the definition of the contract goods, *i.e.*, of the very undertakings of buyer and seller; (ii) as a condition of the buyer's promise to accept a car, whose definition did not include a reference to the age (it can be assumed that it did not form part of the seller's promise to deliver); (iii) as a warranty that the plaintiff would compensate the buyer for the loss he suffered if it was not a 1948 car. Had the statement operated as a condition of the buyer's promise, then no right to damages would have arisen, even though the car turned out not to be a 1948 car. Had the buyer discovered the mistake before taking delivery of the car, he could have refused to have taken delivery. The existing case law suggests that once he has taken delivery he is deemed to have waived the condition, but it may well be contended that merely taking delivery in ignorance of a mistake does not constitute waiver. In the instant case, however,

no question arose of a right to return the car; the issue raised was one of damages.

The judges in dealing with the case employed the terms "condition" and "warranty" in their usual English meanings. Denning L.J. did indeed refer to some of the difficulties arising from the ambiguity of "warranty." The crucial part of his judgment is in the following passage. He points out that the county court judge was in error in holding that because the statement was fundamental "therefore it was a condition and not a warranty. By concentrating on whether it was fundamental he seems to have missed the crucial point in the case which was whether it was a term of the contract at all. The crucial question is: Was it a binding promise or only an innocent misrepresentation. The technical distinction between a 'condition' and a 'warranty' is quite immaterial in this case because it is far too late for the buyers to reject the car."

This passage leads to examination of the meaning of the phrase "term of the contract." Denning L.J. equates "term of the contract" with "promise." But it is submitted that the phrase has also the ordinary meaning of a clause in the contract, a part of the contract. Certainly the present writer has been using the phrase with that meaning. It may well be that Denning L.J. equates "term of the contract" with "promise" because he assumes that the parts of a contract are promises. But a clause in a written contract giving a power of cancellation in certain events is usually described as a term of the contract, though it contains no undertaking. Morris L.J. uses the phrases "term of the contract" and "part of the contract" indifferently. He says "The only point taken on behalf of the defendant was that the statement which was made did not form a part of the contract. The learned judge rejected this. He held that it was not only a term but an essential term." He also describes the statement as being a "statement made contractually." In his own conclusion he says "The statement made which described the Morris car was, therefore, an integral part of the contract." Any other conclusion of fact would be surprising; and it is submitted that the majority judges might have come to the same conclusion had they realised that a statement can be part of a contract as a condition of the performance of a promise, without rendering the maker of the statement liable in damages.

It is also submitted that two other propositions to be found in the majority judgments are open to criticism. Hodson L.J. appears to say that *Heilbut, Symons & Co.* v. *Buckleton* [1913] A.C. 30 lays down the following proposition of law. A bare

affirmation can never be sufficient to constitute a contractual term: there has to be both an affirmation and an intention that the affirmation shall operate as a contractual term; the intention is not to be inferred merely from the circumstances in which the affirmation was made, but must be found as something more than the affirmation, though it can be found from the totality of the evidence. It is submitted that no such proposition is established in *Heilbut's* case. The statement made by Denning L.J. in relation to *Heilbut's* case is preferred: "If an intelligent bystander would reasonably infer that a warranty was intended that will suffice" (*cf.* the similar statement made by him in *Hornal* v. *Neuberger Products Ltd.* [1957] 1 Q.B. 247). Such a proposition would of course have been one of "law," and so have justified the contention of both Denning L.J. and Hodson L.J. that the question of condition, warranty or representation was one of law. This contention has now to be examined.

Denning L.J. continued the statement quoted above about the reasonable inference of a bystander by saying "And this, when the facts are not in dispute, is a question of law. That is shown by *Heilbut, Symons & Co.* v. *Buckleton* itself, where the House of Lords upset the jury's findings of a warranty." The issue, question of law or question of fact, cannot be determined however by the criterion of whether an appellate court has power to reverse the trial court finding. To call every question which may be considered by an appellate court a question of law is to deprive that phrase of any utility. An appellate court often has power to reverse on a question of fact: it certainly has power to reverse by saying there was no evidence to support the trial court finding of fact. Moreover where "primary facts" are not in dispute an appellate court considers itself as able to make inferences from the primary facts as a trial court: *Watt* v. *Thomas* [1947] A.C. 628. But the question of what inference can be drawn from primary facts about facts in issue is best described as itself a question of fact (*cf.* the remarks of Lord Evershed M.R. in *Chivers & Sons Ltd.* v. *Cambridge C.C.* [1957] 2 Q.B. 68 at 76). The definition of the concepts which constitute a rule of law is of course a question of law; but the question whether particular facts fall within a particular concept is a different kind of question, best described as one of categorisation or application. Decisions on application do not constitute binding precedents. Since however an appellate court considers itself as able as a trial court to decide a question of application, the language of "question of law" is sometimes used as a description of such a question. It is, however, submitted that in the instant case the crucial question was

whether the parties intended the reference to the age of the car to operate contractually and that this was a question of brute fact, as to which the judge who heard such witnesses as were called was the best judge.

J. L. Montrose.

MASTER AND SERVANT—DUTY OF MASTER—DEFECTIVE TOOL

The decision of the Court of Appeal in *Davie* v. *New Merton Board Mills Ltd.* is now reported in [1958] 2 W.L.R. 21.

The point involved concerns the nature of the duty owed by a master to his servant. The master in our case bought a normal and rather simple tool—a tapered bar of steel 12 inches long called a drift—from a reputable supplier of such tools, who had himself bought it from the appropriate manufacturer. When used in the normal way by the servant striking it with a hammer on the thick end, a chip flew off and destroyed his eye. The accident was due solely to the excessive hardness of the steel of which the drift was made. This defect of the steel could not be discovered by any reasonable examination on the part either of the master or of the supplier, but it could and ought to have been discovered by the manufacturer. The servant has, it is now admitted, a cause of action at common law against the manufacturer; has he also such a cause of action against the master?

The point, as noted in [1957] C.L.J. 134, is no doubt nice, but it is exceedingly simple. Its niceness sufficiently appears from the judges so far dividing two and two on it: Jenkins L.J. and Ashworth J. being in favour of the servant, and Parker and Pearce L.JJ. against him. Its simplicity has certainly not yet emerged.

In the circumstances of this case, the master can be liable only if his duty is, at the least, a duty to provide tools which are as sound as care and skill on the part of any relevant person can make them. This is not a duty of care on the part of the master. It is a stringent warranty, which in practice (though not theoretically) is only colourably distinguishable from an absolute warranty that the tools are sound, without more. (It took forty years for a case to emerge, *Cammell Laird & Co.* v. *Manganese Bronze Co.* [1934] A.C. 402, in which it became material to decide whether the undertaking of fitness for a purpose in a sale of goods contract is absolute or merely stringent.)

Duties of this degree of stringency are unusual in the law of torts; they are not infrequent in the law of contract. But there is a contract, of employment, between master

and servant. If the courts, despite the experience of *Priestley* v. *Fowler*, are still willing to try their hand at implying terms in a contract of employment, they could quite reasonably imply this undertaking by the master. If they are not willing to import at least this degree of duty upon a master, then the master in our case is not liable. The simple issue is: aye or nay, does *this type of duty* arise in the master as the result of the relationship of master and servant? What is mere confusion is to try to juggle with the notion of a duty of care and to seek to maintain both (a) that the master's duty is a *duty of care* only, and (b) that *in the circumstances of this case* the master is liable.

Leave to appeal to the House of Lords has been given. It is the professional duty of an academic lawyer to allow hope to triumph over experience and to expect that, in a problem which was stated by the trial judge to "arise in naked simplicity," the issue to be determined will actually be formulated at the third attempt.

C. J. Hamson.

DEFAMATION—FAIR COMMENT ON UNTRUE FACTS—PRIVILEGE

Where comment has been made concerning a matter of public interest, *Addis* v. *Odhams Press Ltd.* [1957] 3 W.L.R. 942 is an interesting illustration of a limited exception to the rule that for a defence of fair comment to apply in an action for defamation the defamatory words complained of must be an expression of opinion based on true facts. In the ordinary way, where the words complained of consist of allegations of fact and comment thereon, fair comment requires the truth of the facts to be proved or admitted before the comment can be fair within this defence. Although the strictness of this rule may be mitigated in appropriate circumstances under section 6 of the Defamation Act, 1952, this section still requires proof of the truth of such of the facts alleged or referred to as will allow the comment to be fair comment on those true facts, *i.e.*, comment which an honest, though prejudiced, man might make on those true facts. The exception to this rule arises where the defamation complained of lies in allegations of fact, and defamatory comment thereon, and the allegations of fact are privileged, for example, as being part of a fair and accurate report of parliamentary or judicial proceedings, or an extract from a parliamentary or other official paper carrying privilege. In such a case proof of the untruth of the facts stated will not automatically negative fair comment, and, provided that the comment is fair comment on the facts as stated, the defence can still succeed. So

in *Mangena* v. *Wright* [1909] 2 K.B. 958 (at 977) Phillimore J. stated: "If by some unfortunate error a Vote in Parliament recites, or a judge in giving the reasons of his judgment states, that which is derogatory of some person, and the charge is mistaken and ill-founded, and a newspaper reports such vote or judgment and proceeds in another part of its issue to comment upon the character of the person affected in terms which would be fair if the charge were well-founded, the newspaper which so reports and comments should be entitled to the protection of fair comment." In *Addis* v. *Odhams Press* this ruling was followed where the comment was on the statement of a witness in the witness-box reported as part of a fair and accurate report of a judicial proceeding. The statement of the witness was to the effect that Addis had helped one Grech to draw up a petition to the Home Secretary and was reported as "with the help of Jasper Addis . . . Grech drew up a petition to the Home Secretary. Into it he [Grech] put all the dirt he knew." Addis had not in fact helped Grech draw up the petition and the case is reported only on the ruling whether the statement "with the help of Jasper Addis," which was untrue, could be a basis of a plea of fair comment in respect of the words "Into it he put all the dirt he knew." Donovan J. followed *Mangena* v. *Wright* and held that the fact that a statement made by a witness in a judicial proceeding and reported in a newspaper as part of a privileged communication turns out to be false will not itself destroy a plea of fair comment in respect of comment based on it. It is to be noted in relation to this exception to the normal rule requiring the truth of the facts commented on that the privileged report will have to be on a matter of public interest, and the other essentials of fair comment will have to be proved, *e.g.*, the comment will not be protected if the person making the comment does not believe the facts to be true, for it will not then be honest comment. The pleading of the defence in the *Addis* case was in the form "in so far as the words consisted of allegations of fact they formed part of a fair and accurate report of court proceedings, and in so far as they consisted of expressions of opinion they were fair and impartial comments on a matter of public interest," which is to be contrasted with the pleading where the ordinary rule applies, *i.e.*, that in so far as the words complained of consist of statements of fact they are true in substance and in fact, and in so far as they consist of expressions of opinion they are fair comment on matters of public interest. Finally we might add that no privilege attaches to the publication of an incorrect extract from a public document or report of a judicial proceeding, even though the

incorrect extract or report was officially supplied, and in such a case the ordinary rule will apply in relation to any comment on it.

A. Ll. Armitage.

REMOTENESS OF DAMAGE—SUICIDE—PUBLIC POLICY

If a man sustains serious head injuries as a result of the defendant's negligence, and so falls into a neurotic depression which leads him to commit suicide, is the death a proximate effect of the negligence? This question lay dormant until it was answered in the affirmative by Devlin J. in *Cavanagh* v. *London Transport Executive*, *The Times*, October 23, 1956. The learned judge accepted expert evidence to the effect that severe head injuries were reasonably capable of creating a suicidal temperament, and he was therefore prepared to find as a fact that the suicide was the consequence of the injury. He did not enter any further into the question of remoteness of damage.

Now the matter has been considered again, and more fully, by Pilcher J. in *Pigney* v. *Pointer's Transport Services Ltd.* [1957] 1 W.L.R. 1121. While reaching the same conclusion as Devlin J., Pilcher J. thought that the defendants before him could not have foreseen the suicide, but that they were nevertheless liable on the principle of *Re Polemis* [1921] 3 K.B. 560.

The common sense of holding the defendants liable may seem to suggest that *Re Polemis* is a useful decision. Certainly it may operate to save a somewhat artificial inquiry, namely, what the defendant as a reasonable man would have foreseen if he had stopped to calculate all the possible consequences of his conduct. Yet, granting that the inquiry is a hypothetical and abstract one, it is habitually undertaken in negligence cases, and there does not seem to be too much difficulty in accepting the following as the kind of conversation that might take place with the reasonable man. "If you drive carelessly, do you think it reasonably possible that you may cause serious injury to someone, *inter alia* severe injuries to the head?" Answer—"Yes." "Do you think it reasonably possible that such severe injuries to the head may induce such a state of depression as to lead to suicide?" Answer—"Yes." Even if the answer to the second question is "No," it was not really necessary to rely upon *Re Polemis* for the proposition that the unforeseeable damage was not too remote. Well before *Re Polemis* it was accepted law that an unforeseeable difference in the degree (as opposed to the kind) of the consequence did not prevent proximity; and for this purpose the death of a person was regarded as an injury of the same kind as an injury short of

death (*cf. per* Kennedy J. in *Dulieu* v. *White* [1901] 2 K.B. 669 at 679). The only special feature of *Pigney's* case was that the death was connected with the injury through a mental instead of a physical state.

Another question discussed by Pilcher J. was whether recovery was barred by public policy. He thought it clear that the widow's recovery under the Fatal Accidents Act was not affected by any objection based on public policy, because the damages awarded under this Act formed no part of her husband's estate. The case was therefore distinguishable from *Beresford* v. *Royal Insurance Co. Ltd.* [1938] A.C. 586, where it was held that the estate of a suicide could not benefit from a life insurance policy. Having arrived at this conclusion, the learned judge proceeded without any further discussion to award damages also under the Law Reform (Miscellaneous Provisions) Act, 1934; he assessed them at £200; and since he had already awarded damages to the estate for the deceased's pain and suffering, in respect of an action begun by the deceased in his lifetime and continued by his widow as his personal representative, it seems that the £200 was awarded by way of damages for loss of expectation of happiness. It is strange that Pilcher J. did not think it necessary to discuss the issue of public policy in respect of the award of this sum. The reasoning by which he had upheld the claim under the Fatal Accidents Act would seem to involve a rejection of the claim for loss of expectation of happiness under the Law Reform Act, because the award of damages under the latter head benefited the estate of the deceased. If the claim under the Law Reform Act was to be upheld, some different distinction from *Beresford's* case should have been discovered. It may be suggested that a distinction satisfactory to the social conscience of the present day could be found by pointing to the acute neurosis which resulted in the suicide both in *Cavanagh's* case and in *Pigney's* case. In *Beresford's* case there was no evidence of any abnormal mental state. This line of reasoning suggests the important conclusion that a life insurance policy is enforceable if the assured commits suicide as a result of an anxiety neurosis. It must be confessed, however, that the conclusion is contrary to the tenor of *Beresford's* case, where the House of Lords assumed that the policy could be upheld only if the assured were insane when he committed suicide. The best that can be said is that the issue of neurosis was not actually before the House in that case.

GLANVILLE WILLIAMS.

NUISANCE—NATURAL CAUSES—TREE ROOTS

THE object of the present note is to question the decision in *Davey* v. *Harrow Corporation* [1958] 1 Q.B. 60, already noted in [1957] C.L.J. 137 by D. E. C. Yale. The defendant, the roots of whose elm trees had invaded the plaintiff's land, put forward the argument that such damage was not actionable because it was caused by natural growth. The Court of Appeal rejected this contention, and refused to distinguish between self-sown and planted trees. In so far as the case concerns trees, it calls for little comment; whatever be the law about other natural nuisances, the duty to prevent nuisance being caused by his trees appears to attach to an occupier whether those trees are planted or not: *Noble* v. *Harrison* [1926] 2 K.B. 332. But the more general pronouncements on natural nuisances should be challenged.

(i) There is strong authority for the view that an occupier cannot be made liable for "natural nuisances," *i.e.*, damage caused by natural forces operating upon land in its natural state, even if he could have foreseen that damage and taken reasonable steps to prevent it.

(ii) That proposition does much more than deny liability under the rule in *Rylands* v. *Fletcher*. It denies liability altogether in respect of omissions in such situations. As Mr. Yale suggests, many of the relevant judgments fail to distinguish properly between that rule and nuisance. But it has long been clear that an occupier can incur liability for "continuing" a nuisance by omission to act, even though his "user" of the land is not "non-natural" within the rule. In the cases cited below, the crux of the matter is that the occupiers escaped all liability. The decisions cannot all have proceeded upon a false view of the law of nuisance.

(iii) It is clear, too, that the occupier is liable if he "continues" an incipient nuisance, by failing to take reasonable steps to remedy it when he knew or ought to have known of the state of affairs, if the danger is caused either by a trespasser or other third party, or by natural forces acting on land in an "artificial" condition: *Sedleigh-Denfield* v. *O'Callaghan* [1940] A.C. 880; *Slater* v. *Worthington's Cash Stores Ltd.* [1941] 3 All E.R. 28.

(iv) On the other hand, there seems to be no such duty where the land is (a) in its natural state: *Neath R.D.C.* v. *Williams* [1951] 1 K.B. 115; *Pontardawe R.D.C.* v. *Moore-Gwyn* [1929] 1 Ch. 656; or (b) in a state so little altered that it can be treated as "natural": *Giles* v. *Walker* (1890) 24 Q.B.D. 656 (ploughed field; and see the "mining" cases, *infra*, and D. W. Noel, "Nuisances from Land in its Natural Condition" (1943) 56 Harv.

L.R. 772, 779). In *Davey's* case, Lord Goddard C.J. asserted that a "complete answer" to *Giles* v. *Walker* is to be found, as Professor Goodhart has suggested in his *Essays in Jurisprudence and the Common Law* at p. 155, in the case of *Margate Pier Proprietors* v. *Margate Town* (1869) 20 L.T. 564. But in *Neath R.D.C.* v. *Williams* Lord Goddard himself pointed out that the *Margate* case involved an artificial pier around which seaweed had accumulated; and he there brushed aside the isolated dictum of Lush J. on which he seems to found his argument in *Davey's* case. The other case often cited, *Attorney General* v. *Tod Heatley* [1897] 1 Ch. 560, concerned acts of third parties. As Lord Goddard was at pains to point out in the *Neath* case, neither of these cases covers the problem of liability for continuing natural nuisance, and statute has often had to intervene precisely because "there is no remedy at common law" (*ibid.*, p. 122). (It may be noted, finally, that a similar exemption from liability may arise in cases where the occupier changes the condition of his land back from an artificial to a "natural" state: *Thomas & Evans Ltd.* v. *Mid-Rhondda Co-operative Society* [1941] 1 K.B. 381.)

(v) There are two further indications that natural nuisances stand in a special category:—

(a) A natural accumulation of wild animals does not give rise to liability unless the occupier has in some way caused it: *Seligman* v. *Docker* [1949] Ch. 53.

(b) The cases on mining appear to regard land on which ordinary and proper mining activities have been carried on as land in a "natural" state for the purposes of this special principle of the law of nuisance. This seems to be the effect of cases such as *Wilson* v. *Waddell* (1876) 2 App.Cas. 95, and *Smith* v. *Kenrick* (1849) 7 C.B. 515. If the mining cases are not understood in this sense, it seems difficult to reconcile with *Slater* v. *Worthington's Cash Stores Ltd.* (*supra*; occupier liable for "continuing" snow which collected on roof) cases like *Rouse* v. *Gravelworks Ltd.* [1940] 1 K.B. 489 (no duty on occupier to prevent damage to neighbour's land by rainwater which collected in holes left by his mineral excavation); and both cases were decided by strong Courts of Appeal, which included Goddard L.J. (as he then was). The mining cases do impose liability, of course, if the occupier has done something active to cause the damage; see Salmond, *Torts*, 12th ed., sections 65 and 160; but that is not our problem. Cases in which ordinary mining has been followed merely by flooding, or other natural events, have stressed the occupier's "right to use his own land in the natural course of user," and have not imposed upon him the usual duty to provide against damage likely to arise.

(vi) Many commentators have advanced the view that an occupier ought to be liable if by omission to act he "continues" a natural nuisance, and that the natural origin of the state of affairs ought to make no difference to the application of the principle in *Sedleigh Denfield* v. *O'Callaghan*: *e.g.*, Street, *Torts*, 239, 246; Winfield, *Tort*, 6th ed., 597. Such a proposition may be attractive in order to make the law of nuisance a coherent unity. But it is suggested that it cannot be accepted without reservations in the face of the cases cited above; and to that extent the decision in *Davey's* case should be treated with reserve.

K. W. Wedderburn.

REAL PROPERTY—ADVERSE POSSESSION—FACTS

In *Williams Brothers Direct Supply Ltd.* v. *Raftery* [1958] 1 Q.B. 159 the Court of Appeal had to consider the state of the title to a piece of vacant land at the rear of a block of shops with flats above. The plaintiff, W., had acquired the whole property in 1937, and had leased the shops and flats to a Co-operative Society, who in 1943 sub-let one of the flats to the defendant, R. W. intended to develop the vacant plot when opportunity offered, but the advent of the war in 1939, and the combined effect of the impossibility of new building, and the need to grow more food, led to permission being given to the tenants of two of the flats to grow vegetables on the land behind their premises. R., although given no such permission, began from 1943 to work the land in dispute behind his flat, planting rhubarb and bulbs, and sowing potatoes. In 1948 or 1949 he gave up cultivation and used the land for breeding greyhounds, erecting a shed on a part of it for that purpose. In 1948 W.'s representative, H., had gone on to the land without let or hindrance on two occasions in order to measure it, and W. applied for planning permission to build on the land. In 1953 W. had dumped some rubbish on part of the land, and in 1957 W. sued R. for possession.

For the landowner to lose his rights, it is necessary that he should discontinue possession, or be dispossessed: Limitation Act, 1939, s. 5 (1); and that in either case a squatter should thereafter be in possession for twelve years: *ibid*, section 10 (1). The court had no difficulty in finding that there had been no discontinuance of possession: W's comparative inaction was explained by his intention to develop the land at a future date, and by the impracticability of any such scheme during the war and for some years thereafter, while his measurement of the land and

the dumping of rubbish on part of it effectively rebutted any suggestion of intent to abandon possession. The court went on to hold that there had been no dispossession. Hodson L.J. relied upon *Leigh* v. *Jack* (1879) 5 Ex.D. 264, 273, where the Court of Appeal had held there was no dispossession of a landowner from two pieces of land which he intended to dedicate as a highway, Bramwell L.J. observing that for dispossession "acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it." The decision for the plaintiff in the present case is, with respect, correct. A tendency to confuse discontinuance with dispossession must, however, be remarked upon. Both Hodson and Morris L.JJ. refer to a dictum of Cotton L.J. in *Leigh* v. *Jack* at p. 274: "In deciding whether there has been a discontinuance of possession the nature of the property must be looked at." Their Lordships are, however, dealing not with the question of discontinuance, but of dispossession. A similar misapplication of this dictum occurs in *Marshall* v. *Taylor* [1895] 1 Ch. 641, 645, *per* Lord Halsbury, and this case was relied upon by the county court judge to support his finding, now reversed by the Court of Appeal, that there had been dispossession of W. by R. A. L. Smith L.J. also tended to run the two subjects together in *Marshall* v. *Taylor*. In the present case the distinction was immaterial, and Lightwood says it always will be: "Since, whether there has been a dispossession or a discontinuance of possession, there must in either case be an actual possession by a stranger in favour of which (*sic*) time can run, it does not seem to be of practical importance to distinguish which event has happened" (*Possession of Land* (1894) 204). But it is submitted that the two subjects must be kept distinct, and that the acts of a stranger required to prove possession need not be so strong in the case of a proved discontinuance. Bramwell L.J.'s dictum (*supra*), comparing such acts with the purpose the original owner intended, is not necessarily applicable, as the original owner may no longer have any intention whatever. It is submitted that in the present case, had discontinuance been established, the acts proved by R. to establish his possession would have sufficed to support his right to remain, save perhaps that at the beginning of his occupancy he had no intention of dispossessing the plaintiff. It is also submitted that *Leigh* v. *Jack* would have been differently decided had discontinuance been proved. On the facts, however, the present case is a welcome decision. The animus of the plaintiff to retain possession was clear, and the corpus too sufficed, having regard to the user ultimately contemplated and to external difficulties. On the other hand the animus of the defendant to

dispossess was not clear, and the corpus also had something lacking, bearing in mind that the greyhound sheds had stood only for some eight years of the statutory twelve, though it might well have sufficed had discontinuance been established.

R. N. Gooderson.

REAL PROPERTY—STATUTE OF FRAUDS—LINKING DOCUMENTS—OMITTED TERM

Once upon a time there was a real danger of contracts being fabricated by perjured evidence, or by bribery of juries, particularly in the days when the parties to an action were incompetent witnesses. No doubt the Statute of Frauds, 1677, was wise in its generation in requiring certain contracts to be evidenced in writing signed by the defendant. But it has more and more lost touch with the needs of modern (and more honest) society, and the provision relating to the land, now contained in section 40 of the Law of Property Act, 1925, survives as almost the only unrepealed part of the original scheme. *Timmins* v. *Moreland Street Property Co. Ltd.* [1958] Ch. 110 is typical of the unedifying cases which the statute adds almost annually to the Law Reports, despite the valiant efforts of the judges to stretch it to fit the facts of life. Instead of protecting innocent persons against imaginary contracts, it enables persons who have made genuine contracts to escape from them on technicalities. As long as the statute requires evidence different from that provided by ordinary business methods, so long will it disfigure the law with these unjust results.

The new case deals squarely with one of the commonest situations: where the purchaser of land pays a deposit by cheque, and the vendor gives him a receipt in which the agreement for sale is recorded. If this sensible practice satisfied the statute, much mischief would be avoided. But the Court of Appeal were constrained to hold that on the authorities and the facts of the case the contract could not be enforced by the vendor.

The crucial question was whether the cheque and the receipt could be read together as a composite memorandum, thus linking the statement of the terms (in the receipt) with the purchasers' signature (on the cheque). Several obstacles here present themselves. First, the natural order of events is that the cheque is signed before the receipt is given, and the policy of the statute plainly requires that the signature should authenticate a record already made. That is why, when documents are to be linked, one must start from the defendant's signature and work backwards,

looking for some reference to some other existing document. But the Court of Appeal surmounted this difficulty by holding that where documents are signed and exchanged on the same occasion and in the same transaction, so that in effect they are made and signed contemporaneously, one may be capable of referring to the other even though, on a minute investigation of the order of events, the other was the last to be completed. This accords with common sense, for in such cases the purchaser can protect himself by not parting with his cheque until satisfied that the receipt is in the right form, and the precise order of preparation and signature of the two papers is immaterial.

But a greater obstacle remained, and on this the vendor came to grief. In order to link documents there must either be some reference to the other document in the document signed by the defendant, or they must both patently refer to the same transaction. The principle in both cases is that the defendant's document must itself provide the clue which indicates the connection, either directly or indirectly. A good example of connection through a common transaction is *Burgess* v. *Cox* [1951] Ch. 383. Now a cheque and its receipt, when laid side by side, might be thought to dovetail together and proclaim their connection as well as could be desired. But this is to neglect the principle, for taken by itself the cheque signed by the defendant refers to no other document or transaction: it is merely an order for payment of £n to A by B, and that refers to nothing else whatsoever. That this is an insuperable obstacle is convincingly explained by Jenkins L.J., and there can be no doubt that, roughly though the statute has been handled, it cannot be manipulated to cover these facts without doing undue violence to its policy.

Perhaps it would have been otherwise if the cheque had had the usual counterfoil and the purchaser had made a note on the counterfoil such as "Deposit on purchase of Blackacre." A cheque with a perforated edge indicates that it had a counterfoil, and the reference on the counterfoil would indicate the transaction. But nothing of this kind appeared in the case, and as a practical matter the counterfoil might be difficult to secure from a purchaser's custody.

In cases where the memorandum is complete on its face, the defendant's best hope of escape is to prove that some other term of the bargain is not recorded in the writing. In the present case the property was sold subject to a lease, but nothing was said of that in the receipt. But in fact, naturally enough, the purchasers knew of the lease before the contract was made, and by a well-known doctrine they thereby waived objection to the lease.

Consequently the terms stated in the receipt were complete in themselves, for the purchasers' obligation to take subject to the lease was provided for by the general law and, just as in the case of an implied term, there was no need to make express provision for it in the written record of the contract. This interesting point, unfortunately, was made in vain, owing to the fatal defect of the cheque.

H. W. R. Wade.

CLASS-CLOSING, ACCUMULATIONS AND ACCELERATION

S. J. Bailey

1. Introductory

During the past four years, the problem who is entitled to benefit when a gift has been made to a *class* of persons, such as "the children of A," has been analysed and clarified by a number of learned authors.[1] These investigations were directed principally, though not exclusively, towards the impact upon class gifts of the rule against perpetuities. The following is an attempt, stimulated chiefly by two decisions of Upjohn J., reported in 1957,[2] to explore certain other aspects of the class-closing rules. By way of introduction, however, it is perhaps desirable to begin with (*a*) an attempt to summarise these class-closing rules, followed by some general observations upon them, and in particular upon (*b*) the extent to which they can override a donor's evident intentions and (*c*) the principles upon which they are said to be founded.

The rules

The rules which close a class, when a single gift is made to or among members of that class,[3] fix upon a certain moment and prescribe that no person born[4] after that moment shall enter the class. The appropriate moment is usually called the "period of distribution" or, sometimes, the "period of division." The actual moment which the rules prescribe depends upon whether the class-gift in question is an immediate or a future gift and upon whether or not the class gift is restricted to those members of the class who fulfil some specified contingency, such as attaining twenty-one. The rules for ascertaining that moment are as follows—[5]

[1] Dr. J. H. C. Morris (1954) 70 L.Q.R. 61–87; Morris and Leach, *The Rule against Perpetuities* (1956). See also the Law Reform Committee's report (1956) on the rule against perpetuities, Cmnd. 18, paras. 24, 25; also Megarry and Wade, *Law of Real Property* (1957).

[2] *Re Ransome, decd.* [1957] Ch. 348; *Re Taylor, decd.* [1957] 1 W.L.R. 1043.

[3] There is a different rule for gifts of a separate sum for each of the members of the class. See *Rogers* v. *Mutch* (1878) 10 Ch.D. 25; Hawkins on *Wills*, 3rd ed., 93; Megarry and Wade, *Law of Real Property*, 469.

[4] In spite of the dictum quoted with approval by Hawkins, *op. cit.*, 100, it does not seem as yet settled that "born," for the purpose of class-closing rules, includes *en ventre sa mère* and subsequently born: see, *e.g.*, *Re Gardiner's Estate* (1875) 20 Eq. 647.

[5] See, *e.g.*, *Re Bleckly* [1951] Ch. 740, C.A.; Hawkins, *op. cit.*, 86–100; Megarry and Wade, *op. cit.*, 229–230, 467–469.

1. *Where no contingency is imposed upon each member*:—

(i) If it is an *immediate* gift to the class, the class closes immediately. Hence a bequest of "£1,000 among the children of A" ordinarily benefits only those children of A who are in being at the testator's death.

(ii) If it is a *postponed* gift to the class—postponed, *e.g.*, by a preceding life interest—the class closes as soon as the postponement ends. Hence a bequest of £1,000 " upon trust for B for life and after his death to be divided among A's children," ordinarily benefits both those children who were in being when the testator died and any further children who may be born to A before B dies.

(iii) In neither of the above two cases, however, does the class close if, at the crucial moment, there is as yet no member of the class. Indeed, for that particular situation, there is no class-closing rule at all. Thus (*a*) an *immediate* gift of "£1,000 among the children of A" comprises all future children of A, if A has none when the testator dies. And (*b*) a *postponed* gift of £1,000 " to be divided among A's children after B dies " comprises all future children of A if he had none when the testator dies and still has none when B dies.

2. *When a contingency* (*e.g.*, *attaining 21*) *is imposed upon each member*—" *Rule in Andrews* v. *Partington* ":—

(i) If it is an *immediate* gift, qualified only by some contingency imposed upon each member, the class closes at once if some member has already fulfilled the prescribed contingency; otherwise it will close as soon as some member does so. Thus a bequest of "£1,000 among the children of A who attain twenty-one " includes only children who are in being at the testator's death, if at that moment one or more of them is already twenty-one. But, if none of them is yet of age, the class will close as soon as a child of A does reach twenty-one. And this means, of course, that as soon as there is a child who is twenty-one (*a*) no children born afterwards can enter the class, and (*b*) those already in the class who are as yet under twenty-one must strive to attain twenty-one, so as to qualify for a share in the legacy.

(ii) If it is a *postponed* class-gift, qualified both by a contingency imposed upon each member and by some postponing provision such as a preceding life interest, the class does not close until *both* (*a*) the postponement is over and (*b*) some member fulfils or has already fulfilled the prescribed contingency. Thus, a bequest of £1,000 " to be divided, at the death of B, among such children of A as reach twenty-one,"

embraces (if they ultimately reach twenty-one) all the children of A who were in being when the testator died, *plus* any further children born before B dies, *plus*, if at B's death none of them has reached twenty-one, any further children who are born to A before that child who first reaches twenty-one does so.

In short, if we ignore the anomaly presented by rule 1 (iii) above, the rules prescribe in all these cases that the class shall close as soon as some member of it has become presently entitled to a payment.

[The above are the rules for dividing the gift itself. It should be mentioned, perhaps, that there are some other rules, subsidiary to them, about what should be done with the *income* which the gift produces (1) before or (2) after the class has closed. They appear to be as follows:—

(1) *Income before the class has closed.* Usually the reason why the class has not yet closed is, as we have seen above, that the will or settlement has expressly given the income for a while to somebody else—*e.g.*, to B for life. That presents no problem. In other cases, however, as in 1 (iii) and 2 above, the class may be remaining open because there is as yet no member of the class or no member who has fulfilled a contingency (such as reaching twenty-one) which the gift has imposed upon the members. In this kind of case, we must first decide whether, properly construed, our class-gift was intended to carry its intermediate income with it.[6] If so, the trustees will accumulate the income and add it to the gift.[7]

(2) *Income after the class has closed.* The fact that the class-closing rules have closed the class necessarily implies that at least one member of the class is now unconditionally entitled. If every member of the closed class is unconditionally entitled, there is no problem: for each of them gets his share of the gift (and the income of that share), or, if he is an infant, the trustees retain it for him until he comes of age and accumulate for him any of its income that they do not use for his maintenance.[8] But what happens to a gift, as in rule 2 above, in which some of the members of the closed class are still only contingently entitled? It is a gift, let us suppose, "to such of the children of A as attain twenty-one"; and the closed class comprises, we will suppose, two children only,

[6] For gifts by *will*, there is usually a presumption nowadays that the gift was intended to carry its intermediate income: see *post*, p. 53 and note 57. If it does not carry its intermediate income, there is merely a gap during which that income goes elsewhere: see *Re Stevens* [1915] 1 Ch. 429, 433 (a devise of realty before L.P.A., 1925, s. 175).

[7] See, *e.g.*, *Re Mellor* [1922] 1 Ch. 312 (Eve J. and C.A.); *Re Leng* [1938] Ch. 821, 826. See also Trustee Act, 1925, s. 31 (2). and *Re Bowlby* [1904] 2 Ch. 685, *per* Romer L.J. at pp. 708–709, that where there is a power to use the income for maintaining infants any income not so used is likewise to be accumulated.

[8] See, *e.g.*, Trustee Act, 1925, s. 31 (2). It seems that, on his marriage, though still an infant, the trustees are nowadays entitled to pay him the income of the accumulations: *ibid.*

namely X and Y, of whom X is of age and Y is as yet an infant. Is X entitled to be paid the whole of the income of the gift whilst Y is striving to attain twenty-one? Or should one-half of the income (apart from any of it which the trustees expend on maintaining him) be provisionally set aside and accumulated for Y, in case he may eventually reach twenty-one? After some conflicting decisions, it was ultimately decided that the latter alternative prevails.[9] But, of course, if Y has the misfortune to die under twenty-one, X will then get everything, including the income that has been accumulated.]

Intention

The class-closing rules are often termed "rules of convenience." They ordinarily close the class as soon as any member of it becomes entitled to demand his share.[10] The fact that they close the class at that moment enables the executors or trustees to know, as soon as a member of the class is entitled to claim a share of the fund, the maximum number of the other possible claimants. And so the executors or trustees can safely pay him an appropriate fraction of the fund without delay.[11]

Thus the class-closing rules, now two centuries old, were founded upon a theory of convenience: it is convenient that any member of a class who is qualified to receive a share should get it without delay, even though this means excluding possible members who are yet unborn. Unlike ordinary rules of construction, these rules do not derive from a presumption that a testator, using certain words, *intended* a certain result.[12] Accordingly, indications of a contrary intention, unless very clear and emphatic, do not displace

[9] *Re Holford* [1894] 3 Ch. 30. C.A., *e.g.*, *per* Lindley L.J. at pp. 46–47; see also *Re Ransome* [1957] Ch. 348, 362. But perhaps the former of the two alternatives still applies (as it did for pre-1926 devises of realty) to a class gift *inter vivos* of realty; see *Re Averill* [1898] 1 Ch. 523; *Re Stevens* [1915] 1 Ch. 429, at pp. 433–434: for a gift of realty, legal or equitable, to a contingent class was said to vest the entire income, at first, in such members as have satisfied the contingency.

[10] Somewhat illogically, perhaps, there are two exceptional cases in which they do not close the class at all: *viz.* (i) where the class gift (not being contingent) is immediate and there is as yet no member of the class when the testator dies; (ii) where the class gift (not being contingent) is in remainder and there is as yet no member of the class when the preceding life interest ends: see *Re Bleckly* [1951] Ch. 740, C.A.

[11] If the gift is to a contingent class (*e.g.*, £1,000 between such children of A as reach twenty-one) his fraction may subsequently increase; for some of the other members of the closed class may ultimately fail to satisfy the contingency (*e.g.*, may die under twenty-one).

[12] They are rules of convenience "not founded on any view of the testator's intention": *per* Jessel M.R., *Re Emmet's Estate* (1880) 13 Ch.D. 484, 490; quoted and adopted in *Re Bleckly*, *supra*, at pp. 747, 752. Contrast Hawkins' attempt (*Wills*, 3rd ed., 86) to base the rules upon a presumption that the testator *intended* the objects of his bounty to be ascertained as soon as possible.

them. It is well settled, for instance, that the natural meaning of " the children of A " is *all* the children of A whenever born.[13] Yet, nevertheless, the class-closing rules—even though the gift be explicitly to " all and every the children of A "—close the class so soon as the period of distribution arrives.[14]

In a sense, therefore, the class-closing rules are arbitrary rules. The fact that to let in future children, born after the moment appropriate for distribution, would inconveniently delay that distribution, impels the court to assume (unless there is very strong evidence to the contrary) that phrases such as " all the children of A " or " the children of A born or to be born " means only all the children who may be born before the moment indicated for dividing the fund.[15] The arbitrary element in the class-closing rules lies therefore in the fact that indications in the testator's will which show (or appear to show) that he intended the fund to be divided at a certain moment prevail over words which could, but which do not necessarily, mean that he intended the class to include persons who at that moment are as yet unborn. On the other hand, if there are words which show incontrovertibly that the class is to include such persons, the class-closing rules are not applied. Thus, in *Scott* v. *Lord Scarborough* (1838)[16] a gift to be divided at the expiration of twenty years from the testator's death among all the testator's grandchildren who are now born " or who shall hereafter be born *during the lifetime of their respective parents* " was held to include even grandchildren born more than twenty years after his death.

Another element of the class-closing rules is their assumption that the testator, even though he did not specifically say so in the will, desired the fund to be divided as soon as any member of the class becomes qualified to receive his share of the fund.[17] This element is particularly noticeable when some personal contingency,

[13] See, *e.g.*, Lord Thurlow in *Andrews* v. *Partington* (1791) 3 Bro.C.C. 401, 404; Pearson J. in *Watson* v. *Young* (1885) 28 Ch.D. 436, 445 (the rule " excludes children intended by the testator to take "); also Upjohn J. in *Re Ransome* [1957] Ch. 348. at pp. 358, 359.

[14] *e.g.*, *Re Emmet's Estates*, *supra*: To Henry for life with remainder to " all and every the children of George to be equally divided between them when they respectively attain the age of twenty-one ": Henry died and then a child of George reached twenty-one: *held*, no child born after that can benefit. See also *Re Bleckly* [1951] Ch. 740, 751; also *Re Manners* [1955] 1 W.L.R. 1096, *per* Upjohn J. at p. 1102.

[15] See, *e.g.*, Langdale M.R. in *Scott* v. *Lord Scarborough* (1838) 1 Beav. 154, at p. 168—quoted in Hawkins on *Wills*, 3rd ed., 94. See also *Re Deloitte* [1919] 1 Ch. 209, C.A. (a gift, contingent upon reaching twenty-one, among " all the children of the present or any future marriage of Edward whether they be living at my death or born afterwards ": *held* class closed as soon as the first child of Edward reached twenty-one).

[16] 1 Beav. 154, at pp. 168-169.

[17] For the two exceptions, see note 10 *ante*.

such as attaining twenty-one, is imposed upon each member of the class. The class-closing rule for that type of case is usually called the rule in *Andrews* v. *Partington* (1791),[18] and it prescribes that the class shall close (provided that any preceding life or other interest has ended) as soon as the first member of the class satisfies the contingency. The words of Lord Thurlow, who decided that case, seem to hint perhaps that even in those days it was already settled that a class gift of that type implied, even if the testator had not specifically said so, that the first member of the class to attain twenty-one was intended to be paid his presumptive share of the fund immediately.[19] In some of the subsequent cases, it is true, the rule has been stated as though it applies only where a testator has *specifically* directed that each member of the class is actually to be paid his share as soon as he reaches twenty-one.[20] The more recent cases, however, show clearly enough that a class gift of a fund for those who attain twenty-one is nowadays *assumed* to mean that, on reaching twenty-one, a member of the class is to be paid forthwith.[21] That assumption can be negatived by contrary intention evident in the will: it will be negatived, for instance, if the will gives to the executors a power of advancement, out of the *whole* fund, which is clearly intended to be exercisable even after some member of the class has reached twenty-one.[22]

[18] 3 Bro.C.C. 401; *ante*, p. 40. In fact, however, the rule was then already at least 43 years old: see *Re Bleckly* [1951] Ch. 740, 751.

[19] 3 Bro.C.C. 401 at p. 404:—"Where a time of payment was pointed out, as where a legacy is given to all the children of A when they shall attain twenty-one . . ."
[These words and the decision itself are erroneously attributed to Lord Loughborough in the report of the admirable judgment of Hall V.-C. in *Re Emmet's Estate* (1880) 13 Ch.D. 484, at p. 488].

[20] *e.g.*, Wigram V.-C., in *Mainwaring* v. *Beevor* (1849) 4 Ha. 44, at pp. 48, 49; Buckley J. in *Re Stephens* [1904] 1 Ch. 322, at p. 328, quoted and adopted by Astbury J. in *Re Chartres* [1927] 1 Ch. 466, at p. 474; see also Hawkins on *Wills*, 3rd ed., 96 ("where . . . the share of each child is made payable on attaining a given age . . ."). The facts of some of the earlier cases appear to indicate that it was at one time common form to direct specifically that the shares of the members of the class be *paid* or *conveyed* to them "when and as they respectively attain the age of twenty-one"; see, *e.g.*, *Mainwaring* v. *Beevor*, *supra*; *Re Emmet's Estate* (1880) 13 Ch.D. 484; *Re Stephens*, *supra*.

[21] See, *e.g.*, *Re Chartres*, *supra*, at p. 475, where Astbury J., having quoted Buckley J.'s dictum (see previous footnote) that the rule applies where a testator has *directed* that the fund be divided at a certain time, states that the rule applies if you can discover from the testator's will a "direction or intention" that the fund is to be divided at a certain time. See also *Re Bleckly* [1951] Ch. 740, *per* Jenkins L.J. at p. 755 (in a gift to A for life remainder to the children of B who attain twenty-one, "the period of distribution there marked out by the testator is . . .").

[22] *e.g.*, *Iredell* v. *Iredell* (1858) 25 Beav. 485, approved and distinguished by the Court of Appeal in *Re Deloitte* [1919] 1 Ch. 209 (where the power to advance did not extend so far), at pp. 215, 217. See also *Re Courtenay* (1905) 74 L.J.Ch. 654. The result of such a power is presumably that, at twenty-one, the member's share becomes only vested subject to be divested.

Evidently, therefore, the class-closing rules can be excluded either (i) by a really emphatic and unambiguous indication that the testator or settlor intended to benefit all members of the class, whenever born,[23] or (ii) by a clear indication of intention that the fund should not be divided until some moment later than that which the rules ordinarily prescribe. In other words, if either of these two elements inherent in the class-closing rules—pay a member his share as soon as he has qualified for it and close the class in order to do so—is clearly excluded by the will, the whole of the class-closing rule (including the other element of it) is inapplicable. It is thus true to say that a clear contrary intention, in either direction, displaces the class-closing rules; and so Lord Evershed's opinion in *Re Bleckly* (1951) that these rules are properly rules of construction would seem now to be justified[24] —though perhaps Upjohn J.'s recent phrase "artificial rules of construction" is a more apt and illuminating description of them.[25]

Attempts to justify the class-closing rules

Attempts to justify the existence and indeed persistence of these powerful and somewhat arbitrary rules, by seeking to found them upon some general principle of law rather than upon mere convenience, have taken several forms. Mr. Vaughan Hawkins' attempt, in his celebrated treatise upon the construction of wills, is probably the least satisfactory; for it seems to found them upon an assumption that testators *intend* the objects of their bounty to be ascertained as soon as possible.[26] Some judges have associated the rules—more particularly, perhaps, the rule about gifts to a contingent class—with the court's preference for early vesting.[27] Some have spoken as though the rules cannot be justified at all.[28] And some, including Evershed M.R. and Jenkins L.J.,[29] have spoken well (or at least have declined to speak ill) of them.

[23] See also the judgment of Evershed M.R., in *Re Bleckly*, *supra*, at pp. 750–751.

[24] *Ibid.*, at pp. 750–751. Hitherto most of the judges had avoided saying this, preferring the neutral term "rules of convenience"; but there were some exceptions, *e.g.*, James L.J. quoted in note 26. *infra.*

[25] *Re Ransome* [1957] Ch. 348, 358.

[26] Hawkins on *Wills*, 3rd ed., 86. This assertion that the rules are founded upon intention is inconsistent with many judicial dicta (see note 12, *ante.* and the dicta quoted and cited *post*, p. 46, and notes 30–32). In support of it he cited a passage from the judgment of James L.J. in *Re Ridge's Trusts* (1872) 7 Ch.App. 665, at pp. 668–669, to the effect that, for reasons of family convenience and public policy, interests are to be construed as *vested* as soon as they can be consistently with what the testator has said.

[27] See, *e.g.*, the passage from James L.J. cited in preceding note: also Upjohn J. in *Re Ransome* [1957] Ch. 348, at pp. 358–361, (as to which see further *post*, p. 47).

[28] *e.g.*, Lord Thurlow in *Andrews* v. *Partington* (1791) 3 Bro.C.C. 401, 404; Astbury J. in *Re Chartres* [1927] 1 Ch., at pp. 471, 475.

[29] *Re Bleckly* [1951] Ch. 740, at pp. 747–748, 752.

The most interesting and, it would seem, the most significant justification of the rules, however, is that they are designed to reconcile two contradictory intentions displayed by the will or settlement. Vice-Chancellor Wigram, in *Mainwaring* v. *Beevor* (1849), confronted by a class gift for children who attain twenty-one, stated this dilemma and the appropriate class-closing rule as follows:

> "When a testator has given two inconsistent directions, and has said that the children, or (which is the same thing) all the children, shall participate in the fund, and then directs that there shall be a division when or as soon as each attain twenty-one, in that case you must do one of two things—you must either sacrifice the direction that gives a right to distribution at twenty-one, or sacrifice the intention that all the children shall take. The court has in such cases decided in favour of the eldest child taking at twenty-one, and sacrificed the intentions that all the children shall take." [30]

The dilemma basis was stated similarly by Buckley J. in *Re Stephens* (1904),[31] in words which have often been quoted since; and he added the important rider, based upon a detailed review of previous cases, that "the rule is never applied unless it is necessary." And when, in *Re Chartres* (1927),[32] the principle of the dilemma was likewise adopted by Astbury J., he, too, added a significant point; for, restating the dilemma in his own words, he began "if you can discover from a testator's will a direction or intention that" the fund is to be distributed at a certain time. And so the former dicta, which had appeared to confine the rule to cases of an *express* direction to pay at a certain time (*e.g.*, at twenty-one), became clearly applicable also to an intention to pay at a time which the testator (*e.g.*, by confining the class to those who reach twenty-one) had merely indicated by implication.

This dilemma principle, though formulated when the class-closing rules were already firmly established, would seem to be an appropriate and a sufficient basis for all of them and well fitted to take its place among other principles of construction (such as

[30] *Mainwaring* v. *Beevor* (1849) 8 Ha. 44, 49. See also the passage, *ibid.* at p. 48: "In the case of a gift to children when they attain twenty-one the reason of the rule of the Court is that the eldest child, on attaining twenty-one, has a right to demand his share, and that this right is inconsistent with a gift to 'all the children' including those who may afterwards be born of the parents named."

[31] [1904] 1 Ch. 322, 328.

[32] [1927] 1 Ch. 466, at pp. 474–475. In this case, unlike *Mainwaring* v. *Beevor*, *supra*, and *Re Stephens*, *supra*, there was no express direction to pay.

the rule in *Lassence* v. *Tierney* [33]) which contrive to reconcile apparently inconsistent manifestations of intention. Unfortunately it was not mentioned by the Court of Appeal in *Re Bleckly* (1951) [34] where what was stressed was simply the convenience of the class-closing rules in that they prevent the payment of a child's share from being delayed. Since then, however, Upjohn J. has twice considered these rules—in *Re Manners* (1955)[35] and in *Re Ransome* (1957) [36]—stressing chiefly the policy of the law in favour of early vesting.

The policy in favour of early vesting is not, one would think, inconsistent with either the dilemma basis or the convenience basis of these rules. Indeed, one would have thought that the rules and the early vesting policy are quite unrelated to one another. The early vesting policy, as generally understood, does nothing more than presume in a doubtful case that a gift is *vested* rather than contingent [37]; whereas the class-closing rules do nothing more than presume that a member of a class, who has already fulfilled any contingency imposed upon him (*e.g.*, reaching twenty-one), is entitled at once—unless the will clearly indicates some later date—to be *paid*.[38] It seems likely, however, that Upjohn J. when in *Re Ransome* he enlarged upon this matter and attributed all the class-closing rules to "the policy in favour of early vesting," was using the phrase "early vesting" in a somewhat special sense, as equivalent to "early payment" or early entitlement to receive

[33] (1849) 1 Mac. and G. 551: *i.e.*, the rule that words of absolute gift, followed by a clause which imposes trusts, operates as a gift in so far as the trusts fail: it is now sometimes called the rule in *Hancock* v. *Watson* [1902] A.C. 14. See likewise the benevolent principles of construction which cut down unmanageably wide words such as "my relations."

[34] [1951] Ch. 740.

[35] [1955] 1 W.L.R. 1096.

[36] [1957] Ch. 348.

[37] See, *e.g.*, Megarry and Wade, *Law of Real Property*, 172–173. For the technical meaning of "vest," see Hawkins, *Construction of Wills*, 3rd ed., 263–265. It seems that this presumption of early vesting was originally confined to real estate—see Hawkins, *op. cit.*, 282; Theobald on *Wills*, 11th ed., 468—but it seems nowadays to apply even to legacies of personalty unless the legacy is postponed for reasons personal to the legatee: see Joyce J. in *Re Couturier* [1907] 1 Ch. 470, 472; *Browne* v. *Moody* [1936] A.C. 635, P.C.; Harman J. in *Re Hickman* [1948] Ch. 624, 627 (necklace). It should be noted that the "vesting" which the presumption achieves is vesting in interest (not necessarily in possession) and may be only a temporary vesting—*i.e.*, vested subject to be divested: see, *e.g.*, *Bickersteth* v. *Shanu* [1936] A.C. 290, P.C., at pp. 297-298; Theobald, *op. cit.* 468.

[38] The class-closing rules are therefore more closely akin to (i) the rule in *Saunders* v. *Vautier*, whereby "when property is once absolutely vested in a person who is *sui juris*, he is entitled to receive it" (*Hilton* v. *Hilton*, 14 Eq. 468, *per* Malins V.-C., at p. 475), and (ii) the rule in favour of distributing part of a fund, *e.g.*, of residue, although it is charged with annuities (see notes 43, 44, *post*).

possession of one's share.[39] In that sense, of course, his Lordship's so-called policy of early vesting is completely consistent with the class-closing rules and with both the dilemma basis and the convenience basis upon which former judges have founded them. Moreover, when his Lordship came to the rule in *Andrews* v. *Partington* (for closing contingent classes) he did not fail to mention both convenience and dilemma, for he added[40]: "That rule is said to be based partly on convenience and partly on an inconsistency in a gift to all the children of A when they attain twenty-one, for a child attaining twenty-one has a right to demand his share, see *Mainwaring* v. *Beevor*."

2. Preceding Direction to Accumulate

Sometimes a gift to a contingent class, as to those who reach twenty-one, is delayed because it is preceded by a simple direction to accumulate the income of the fund for a certain period.[41] Similarly, a class gift is sometimes delayed by a direction to accumulate any *surplus* income of the fund during the currency of a power, given by the will, to use the income for the maintenance of infant children,[42] and/or during the existence of life annuities

[39] His Lordship's opinion that the class-closing rules (the "artificial rules of construction") derive from "the policy in favour of early vesting" is expounded in *Re Ransome* [1957] Ch. 348, at pp. 358–361, and concludes with a statement that the policy of early vesting is not applied "except where there is someone in existence who can say upon the natural construction of the language of the Will that his share has *absolutely vested in interest and possession*" [my italics]: *cf.* note 37, *supra*. The policy, so described, is evidently a policy about what is to be done *after* someone's rights have become vested, not a policy which helps them to vest early. In fact the Court of Chancery always favoured both early vesting and early possession —see Lord Davey, *Wharton* v. *Masterman* [1895] A.C. 186, at pp. 198–199.

[40] *Re Ransome*, *supra*, at p. 359.

[41] *e.g.*, *Oppenheim* v. *Henry* (1853) 10 Ha. 441 (to accumulate for twenty years); *Watson* v. *Young* (1885) 28 Ch.D. 436 (same for twenty-one years); *Re Stephens* [1904] 1 Ch. 322 (direction, so long as any child of Sarah is under twenty-one, to invest and accumulate £24 a year; the resulting fund to be divided between such of her children as reach twenty-one, and their shares therein to become vested when and as they respectively reach twenty-one).

[42] *e.g.*, *Mainwaring* v. *Beevor* (1848) 8 Ha. 44 (maintenance and accumulation, subject to life annuity, until the children of William and James reach twenty-one; with directions to pay £2,000 to each child as he reaches twenty-one, and when *all* have reached twenty-one, to divide the fund among them); *Hilton* v. *Hilton* (1872) 14 Eq. 468 (life annuity, maintenance and education of children, and accumulate surplus till youngest attains twenty-one, and then divide the fund between them); *Re Watt's Will Trusts* [1936] 2 All E.R. 1553 (maintenance of Gerald and his children, annuities for Gerald and his wife, accumulate surplus income during minority of his child or children, and then divide fund among such as are then living); *Re Ransome* [1957] Ch. 348 (education of Robert's children and accumulate surplus until youngest reaches twenty-one; then divide fund among those then living). Contrast *Re Emmet's Estate* (1880) 13 Ch.D. 484 (the income *of the prospective share* of any child under twenty-one to be available for his maintenance and *its* surplus accumulated); likewise *Re Turner's Will Trusts*

which are payable out of the income of the fund.[43] In this type of case, of course, the fact that the income of the whole fund is to be devoted for a period to such special purposes will ordinarily show, as conclusively as a preceding life interest would show, that the testator did not wish any part of the fund to be paid out to members of the class until that period is over.[44] Until that moment, therefore, no member of the class is entitled to demand anything, even though he has reached twenty-one and so has become

[1937] Ch. 15, C.A. (the like as to the presumptive share of any grandchild living at my death whilst under twenty-eight years of age). Contrast also *Re Manners* [1955] 1 W.L.R. 1096 ("to be administered towards their maintenance and education until the youngest is twenty-one years of age" —but no express provision to accumulate).

[43] See previous footnote for cases in which there were both annuities and powers of maintenance. The facts which gave rise to *Harbin* v. *Masterman*, *infra*, and *Wharton* v. *Masterman*, *infra*, involved annuities alone (fund to be divided among five charities after the death of last surviving annuitant and, meanwhile, surplus income to be accumulated) but there the question of closing a class did not arise—see note 44, *infra*. It seems that the court's practice (note 44, *infra*) of distributing what it can of a fund, in spite of annuities, does not displace an express direction to accumulate surplus income: see the brief paragraph dealing with the ascertainment of the class in *Re Deloitte* [1926] Ch. 56, 62 (annuity for Annie, charged on the income of a fund, with a direction to accumulate surplus income followed by a gift of the fund, from and after her death, to her children who attain twenty-one: the decision that the class could not close in Annie's lifetime did not, in terms, mention the annuity but emphasised only the direction to accumulate during her lifetime).

For the principles of construction which determine whether the annuity is charged upon both the capital and the income of the fund, or only upon the income, see *Re Coller's Deed Trusts* [1939] Ch. 277, C.A. If the annuity is charged only on income, this usually means (*cf.* note 55, *post*) that each payment due to the annuitant is charged on surplus income from other years as well as on current income: hence there is, with such annuities, an implied (even if no express) trust to accumulate surplus income —though not beyond the permissible statutory periods: *ibid.*, at p. 282; *Re Robb* [1953] Ch. 459.

[44] It seems that, in the absence of an express direction to accumulate surplus income, the period of distribution of a fund is not ordinarily deferred either by annuities payable out of it (*Hill* v. *Chapman* (1791) 3 Bro.C.C. 391; *Re Whiteford* [1903] 1 Ch. 889) or by powers of maintenance out of the whole fund (see Upjohn J. in *Re Manners* [1955] 1 W.L.R. 1096, 1102; but contrast *Re Courtney* (1905) 74 L.J.Ch. 654, 655, *obiter*, to the contrary: the latter decision followed *Iredell* v. *Iredell* (1858) 25 Beav. 485, in which there were both powers of maintenance and powers of advancement extending beyond the normal period of distribution—see note 22, *ante*). The rule appears to be, at any rate for immediate class gifts, that the fact that a mere part of the fund will not become available until a later date, does not, even as to that part, postpone the closing of the class: see Hawkins, *Wills*, 3rd ed., 95. Annuities seem to fall within this rule, since the court's practice is to set aside for them a supposedly adequate *part* of the fund in order that the rest of the fund (despite the annuitant's undoubted right to follow it in case of need) can be distributed without delay. See *Harbin* v. *Masterman* [1896] 1 Ch. 351 (Stirling J. and C.A.), at pp. 355–356, 361, 362, where a direction to accumulate surplus income until all the annuitants were dead was in fact a complete nullity (see note 55, *post*) in consequence of the rule in *Saunders* v. *Vautier*—so held in *Wharton* v. *Masterman* [1895] A.C. 186, as explained in *Berry* v. *Geen* [1938] A.C. 575, at pp. 583–584. [Where annuities are charged upon income, there may be an *implied* trust to accumulate surplus income: see preceding note.]

qualified for a share in the fund. Only when the specified period of accumulating is over, and some member of the class fulfils or has already fulfilled any contingency (such as reaching twenty-one) that the gift imposed upon them, does the class close.[45] In short, a class gift postponed by a direction to accumulate is governed by the same class-closing rules as govern any other postponed gift to a class.

Excessive direction to accumulate

What if the period of accumulation, which the settlor or testator directed, is *excessive* and so is reduced, by the statutory rules against excessive accumulation, to one of the permissible shorter periods? Let us suppose, for instance, that a testator directed that a fund be set aside, that its income be accumulated from the date of his death until the death of B, and that the fund with its accumulations be then divided among such of B's children as attain twenty-one years of age.

The maximum alternative periods which the statutory rules permit for an accumulation directed by a will are (i) twenty-one years from the date of the testator's death; (ii) the minority or minorities of persons living or *en ventre* at the date of his death; (iii) the minority or minorities of persons who would, if of full age, be entitled to the income directed to be accumulated.[46] Our testator, however, has selected neither of these. Nor have we any indication that the accumulation which he directed is covered by either of the statutory exceptions—such as the exception in favour of accumulations "for raising portions" for his or some beneficiary's issue.[47] His direction to accumulate from the date of his death until the date of B's death is therefore void in so far as it extends beyond that permissible statutory period which is

[45] *Oppenheim* v. *Henry*, *supra*; *Watson* v. *Young*, *supra*; *Re Stephens*, *supra*; *Re Watt's Will Trusts*, *supra*. Compare Malins V.-C., in *Hilton* v. *Hilton*, *supra*, at p. 475, seeming to imply that such indications of intention to postpone division of the fund are not of themselves strong enough to keep the class open unless one can discern some sound reason for them: but there the class was not capable of increasing; moreover he was seemingly influenced there by an unduly wide conception of the rule in *Saunders* v. *Vautier*.

[46] Law of Property Act, 1925, s. 164, re-enacting Accumulation Act, 1800. Another period of accumulation allowed by the statute is "the life of the grantor or settlor": it is available for accumulations directed by a settlement *inter vivos* (as in *Jagger* v. *Jagger* (1883) 25 Ch.D. 729), but it obviously cannot apply to an accumulation directed by will: *Re Cattell* [1914] 1 Ch. 177, C.A., at p. 186. There would appear to be nothing in section 164, nor in the Act of 1800, to indicate that (as 19th-century decisions have held) directions to accumulate which exceed the perpetuity period are to be treated differently (*i.e.*, as *entirely* void) from those which merely exceed the statutory periods.

[47] As to this exception, see L.P.A. 1925, s. 164 (2); also *Re Stephens* [1904] 1 Ch. 322, 327 (an accumulation for a class); and *Re Elliott* [1918] 2 Ch. 150.

most appropriate to this particular case.[48] And, says the statute, during the void excess of the period of accumulation which the testator has directed, the income shall go instead to " the person or persons who *would have been entitled thereto if such accumulation had not been directed.*" [49] The statute is therefore saying, not that the persons who are to get the accumulations will get also the income which the statute prevents one from accumulating. It is saying, in effect, that that income must go to someone else—to the person who would get that income if there were no direction to accumulate at all. And, since wills which direct a period of accumulation seldom or never say specifically who is to have the income in case the direction to accumulate it turns out to be invalid, that person is almost invariably he who is entitled (by residuary gift or by intestacy) to the testator's undisposed-of property.[50] The statute thus creates a gap and says who is to fill it; but it does not say that the person or class for whose ultimate benefit the income was directed to be accumulated is to have anything during that gap—it does not even enable him to have at once the valid accumulations which have already been made.

The fact that the statutory rules against excessive accumulations do not accelerate a gift which follows after an excessive direction to accumulate has a special importance when that gift is a gift to a class; for it means that the statutory rules do not advance the date at which the fund becomes available for distribution among the class, and so do not advance the date at which the class-closing rules will close the class.[51] Thus, in the case of our supposed testator, who directed a fund to accumulate from the date of his death until the death of B, whereupon the fund with its accumulations was to be divided among such of B's children as reach twenty-one, the class cannot close until B dies. If the direction to accumulate is wholly good (*e.g.*, because " for raising portions "),[52] it keeps the fund away from B's children until B dies. If the direction to accumulate is cut down by the statute

[48] See *post*, p. 64 and note 92, for the authorities on this difficult point.

[49] L.P.A., 1925, s. 164 (1), repeating almost verbatim the words of the Act of 1800.

[50] See the judgments in *Wetherall* v. *Thornburgh* (1878) 8 Ch.D. 261, C.A.; also *Berry* v. *Geen* [1938] A.C. 575, 581–582; *Re Ransome* [1957] Ch. 348, 362. It would be otherwise, presumably, if the will gave to the ultimate beneficiaries both the accumulations and an *immediately vested* interest in the original fund: see *Re Travis* [1900] 2 Ch. 541, C.A., *per* Rigby L.J. at p. 549: in such a case, if such beneficiaries are *sui juris* and entitled to the absolute interest therein, they could presumably stop the accumulating altogether (by the rule in *Saunders* v. *Vautier*) and so the statutory limits upon accumulating would not apply at all. See further pp. 52–55, *post*.

[51] Contrast the acceleration of a remainder to a class when the preceding life interest perishes: *post*, pp. 57–60.

[52] See *ante*, p. 50 and note 47.

(*e.g.*, in so far as B outlives the testator by more than twenty-one years) the fund is kept away from the children, first by the truncated direction to accumulate and then, for the rest of B's lifetime, by the words of the statute. In neither case therefore can the fund become available for the children until B is dead. Accordingly, although some child of B may already have reached twenty-one, in neither case can the class-closing rules close the class before B dies and so exclude any future children of B who are yet unborn.

Some of the cases reach this same result by a different route. They begin with an old rule, invented for perpetuities: one should first consider the will or settlement without regard to the rules against perpetuities and accumulations, and then, having thus ascertained (uninfluenced by what those rules will do) the period of accumulation which the document has in fact prescribed, one lets those rules attack it. This method of approach, designed lest benevolent judges should strain the meaning of a gift in order to save it from invalidity, has tended to emphasise, in problems on directions to accumulate, the testator's evident intention that the postponed class is to get nothing until the (excessive) period of accumulation has finished. And that conclusion in itself, without direct assistance from the words of the statute, is inclined to be considered nowadays as showing sufficiently that the class cannot close until that (excessive) period is over.[53]

Rule in Saunders v. *Vautier*

Occasionally, of course, a will which directs an excessive accumulation of income (or of surplus income) for X makes it clear that X is to get all such income—not merely the accumulations of it. The will may begin, for instance, by saying that X is to have all the income (or surplus income) of the fund and then direct that it is to be accumulated for him for some excessive period.[54] In that case he is indeed the person who, in the words of the statute, would have been entitled to the income "if such accumulation had not been directed." In that case, accordingly, he is entitled even to income which arises after the permissible statutory period for accumulating is over. Moreover, if X is *sui juris*, he can in such a case stop the accumulating entirely;

[53] *e.g.*, *Re Deloitte* [1926] Ch. 56 (class gift preceded by life annuity with direction to accumulate surplus income), *per* Tomlin J., at p. 62. See also the more recent of the cases mentioned in note 50, *ante*, which tend to show a presumption, without express reference to the words of the statute, that the income during the excessive part of an invalid direction to accumulate falls into residue or intestacy—*e.g.*, *Berry* v. *Geen* [1938] A.C., at pp. 581–582, *per* Maugham L.C.

[54] See also the dictum of Rigby L.J. mentioned in note 50, *ante*.

for, being solely entitled to the income, he is entitled by virtue of the rule in *Saunders* v. *Vautier*—which enables absolute owners of property who are *sui juris* to call for that property at once—to claim that it be paid to him without delay.

Such was the decision of the Court of Appeal in *Harbin* v. *Masterman* (1894) affirmed by the House of Lords *sub nom. Wharton* v. *Masterman* (1895).[55] Usually, however, as we have seen already, gifts which direct income to be accumulated for an excessive period for X say merely that he is to have at the end of that period the *accumulations* (together, perhaps, with the fund from which that income came). In ordinary cases, therefore, he is not solely entitled to the income and so is not entitled to stop the accumulating; for the gift has not given him both the income which can be validly accumulated and that which cannot.[56]

What, then, of the old rules, now augmented by section 175 of the Law of Property Act, 1925, whereby most gifts by will—though not gifts by deed—whether they be vested or contingent, carry with them their intermediate income unless the will expressly

[55] [1894] 2 Ch. 184; [1895] A.C. 186. Here the direction was to accumulate the surplus income of a fund of residuary personalty, which was bequeathed to X subject to certain annuities, until the death of the last survivor of the annuitants. The words of the will showed that each annual payment of each annuity, though payable out of the income from the fund in that particular year, was not payable out of the surplus income of any other year. Hence, the annuitants had no rights against the surplus income of the fund. Hence, the gift to X, of both the surplus income and the accumulations of it, meant that X (who was in fact five charities) was solely and absolutely entitled to all surplus income.

This same will had given to X (the five charities) the capital also of the residuary fund, as from the death of the last surviving annuitant. Was X entitled to have all or any of the capital of the fund immediately? At first sight one would think not, for, if some of the capital is thus reduced, the income available for paying the annuitants is reduced also. However, when this question in turn was litigated, in *Harbin* v. *Masterman* [1896] 1 Ch. 351 (Stirling J., and C.A.), the court applied another ancient rule which, like the rule in *Saunders* v. *Vautier* (1841), gives an absolute donee early possession in spite of the words of the will. By this rule, part of the *capital* of a fund charged with annuities is payable at once to the donee of the fund, so long as what remains is almost certainly sufficient to produce the annuities. See, further, notes 43, 44, *ante*.

[56] See the cases cited in note 50, *ante*. In *Berry* v. *Geen* [1938] A.C. 575, where there was a direction, during the lives of annuitants, to accumulate for X the surplus income of a fund of residue which was subject to annuities, the will (unlike the will in *Wharton* v. *Masterman*—see preceding note) gave the annuitants each year a right both against the current income of that year *and against the surplus income of other years*. Hence X was not solely entitled, under the will, even to the surplus income which was validly accumulated. Nor indeed (unlike *Wharton* v. *Masterman*, *supra*) did the will in this case distinctly give to X, who was in fact two charities, the surplus income of the fund whether accumulated or not. Hence X had no right to surplus income during the invalid part of the direction to accumulate: that went accordingly as on intestacy. There were thus two separate reasons here why X was not solely entitled to the surplus income and so was outside the rule in *Saunders* v. *Vautier*.

disposes of it?[57] Do they enable X, a legatee or devisee, to take advantage of the rule in *Saunders* v. *Vautier* and countermand a direction in the will that the income of his gift is to be accumulated for him during some excessive period? Can we say, in other words, that X is entitled not only to the income which it is permissible to accumulate but also to that which the statutory rules say shall not be accumulated? Seemingly no: for the will, by its excessive direction to accumulate the income beyond the statutory limits did (attempt to) dispose of the whole of it; and, as we have seen,[58] the court's practice is to begin by construing the will without regard to the statutory rules.[59] So it seems that this direction to accumulate, though excessive and therefore partially invalid, negatives entirely the normal presumption that a gift to X is intended to carry its intermediate income with it.[60]

Now let us suppose that our X, of the two preceding paragraphs, who claims the right to stop an accumulation which the will directed for his benefit, is in fact a member of a contingent class. The will, let us suppose, bequeathed a certain fund to such children of A as reach twenty-one, and directed that the income of the fund was to be accumulated, throughout A's lifetime, and added to

[57] Those rules do not apply to future *vested* gifts of residue: *Re Gillett's Will Trusts* [1950] Ch. 102. Nor do they ordinarily apply to general pecuniary legacies: ordinarily these, at best, carry interest—not income—for the legatee's maintenance (*e.g.*, if bequeathed to testator's infant child): see Snell's *Principles of Equity*, 24th ed., 330. But, when a money legacy is to be set aside as a separate fund, that fund thereupon carries its income with it: see *Re Boulter* [1918] 2 Ch. 40, 44–45; *Re Reade-Revell*, *infra*. The rules when they apply to a contingent gift mean only that the intermediate income is accumulated until the contingent beneficiary obtains a vested interest: see *Re Leng*, *infra*, at p. 826; *Re Ransome* [1957] Ch. 348, 362. They do not apply to gifts *inter vivos*: those, when contingent, do not carry intermediate income unless the gift says so: *Re Crosslay's Settlement Trusts* [1955] Ch. 627.

[58] *Ante*, p. 52.

[59] See the decisions which hold that there is no statutory power of maintenance (under Trustee Act, 1925, s. 31) because an express direction to accumulate prevents a deferred contingent gift from carrying its intermediate income: *e.g.*, *Re Reade-Revell* [1930] 1 Ch. 52 (accumulate till legatee becomes twenty-one); *Re Stapleton* (1946) 174 L.T. 188; [1946] 1 All E.R. 323 (accumulate surplus income of contingent residuary gift during the life of an annuitant). The latter decision distinguished *Re Leng* [1938] Ch. 821 (to the contrary), where there was *no express direction to accumulate* during the contingency, though the executors were in fact accumulating pending the contingency according to the normal practice (see penultimate sentence of note 57, *supra*).

[60] So held by Upjohn J. in *Re Ransome*, *supra*, at pp. 364–366, in answer to an argument that X ought to be paid all the income during the excessive part of the testator's direction to accumulate the income of the fund. [In fact X, in *Re Ransome*, had only as yet a contingent right in the fund; but he was twenty-one, and so, if the gift to him carried intermediate income, he was entitled by virtue of section 31 (1) of the Trustee Act, 1925, to be paid the income of his prospective share—which at present was the whole of the fund.]

the fund. Let us suppose also that, at the testator's death, X is as yet the only child of A and is already twenty-one. Does the rule in *Saunders* v. *Vautier* enable him to stop the accumulating at once, and so to close the class, prematurely, whilst he is still the only member of it? The answer presumably must be no: for, even if we ignore the likelihood that this direction to accumulate, probably excessive, gives rights to the residuary legatee, the very fact that the class is as yet open shows that he is not as yet solely and absolutely entitled to the fund or to its income [61]; and the fact that he is not as yet solely and absolutely entitled shows that he has no right (under the rule in *Saunders* v. *Vautier*) to stop the accumulating and so to close the class.[62] This was the basis of the decision in *Re Deloitte* (1926),[63] in which the court held, moreover, that the fact that A—who was in that case a woman aged sixty-five—was probably past the age of child-bearing did not itself close the class or enable the court to close it.[64]

3. Acceleration of Class Gifts

It seems, indeed, that there is nothing that a member of a class can do in order to accelerate the closing of the class. There are, however, at least three decisions to the effect that a person, who has rights over the fund which are postponing its distribution among the class, can accelerate the date of distribution by giving up his rights.

Release of a power

One of these was the decision of Astbury J. in *Re Chartres* (1927) where Richard had a power to appoint by his will among

[61] The class in this problem closes at A's death; meanwhile the theoretical possibility that A may have more children prevents X from establishing that he is solely and absolutely entitled. If the class gift here, instead of being postponed by a direction to accumulate income, were merely postponed for a certain period, during that period X (having already a vested interest) would be entitled, by a rule of convenience, to be paid the whole income for the time being, until the class increased: *Re Ransome* [1957] Ch. 348, 362.

[62] Even if he were entitled to stop the accumulating, *quaere* whether this would close the class. Presumably it would; for the fact that to close the class thus prematurely would do violence to the testator's evident intentions seems to be no objection—see the cases on acceleration discussed in the following paragraphs.

[63] [1926] Ch. 56, where there was also a life annuity for A charged on current income, but not on accumulations of income—see note 43, *ante*.

[64] Nevertheless, the court, by a rule of convenience in administration, would treat the class as closed in such a case if no third parties (such as a residuary legatee having a claim to income when the statutory rules stop an excessive accumulation) are concerned: *ibid.*, at p. 65. And in *Berry* v. *Geen* [1938] A.C. 575, the Law Lords seemed unsympathetic to leaving the class open in such a case—so also were the Law Reform Committee in 1956 (Cmnd. 18, paras. 13, 14).

his children or remoter issue, and, on default of appointment, the fund was to go to all Richard's children who should attain the age of twenty-one years.[65] These provisions were contained in the will of Richard's father, which incidentally had postponed the enjoyment of them for a preliminary period of twenty-one years during which the income of the fund was to be devoted to certain other purposes (annuities etc.). Towards the end of that preliminary period, (i) Richard's only child, Archibald, reached twenty-one, (ii) Richard by deed poll *released (and thereby destroyed) his power of appointment*, (iii) Archibald died, leaving everything to Richard.

Then the preliminary period of twenty-one years ended, and Archibald's executors asked the court whether, as his executors, they were now absolutely entitled to the fund. Astbury J. held that they were. The effect of the gift over on default of appointment was that Archibald, on reaching twenty-one, had obtained a vested interest in the fund, subject to its being divested (partially or entirely) by the birth of any other children to Richard or by any appointment to them which Richard might make by his will. Richard was fully entitled in law to release his power of appointment (for it was not a power in the nature of a trust)[66]: accordingly, when he did so release it, Archibald's vested interest in the fund was now limited only by the possibility that other children might be born and join him in the class of those entitled (at twenty-one) in default of appointment. And at the death of Archibald, of course, this vested interest of his passed to his executors. Then, when the preliminary period of twenty-one years expired, the fund became distributable among the class entitled in default of appointment; and so the class closed at once, and any further children who might afterwards be born to Richard were excluded.

It is true, said Astbury J., that the testator evidently did not intend a distribution of the fund until Richard was dead, for otherwise the power to appoint *by will* which the testator had given him would have been unworkable.[67] It is true also that, in default of an appointment, the testator evidently wished all Richard's children, whenever born, to participate in the fund.[68] Nevertheless, if Richard's power to appoint, which he had the legal right to destroy, and did destroy, had never been in the

[65] [1927] 1 Ch. 466.
[66] A power in the nature of a trust cannot be released: see *Re Mills* [1930] 1 Ch. 654. That the power in *Re Chartres* was not such a power is shown by the gift over in default of appointment: *ibid.*
[67] [1927] 1 Ch., at p. 477.
[68] *Ibid.*, at pp. 470–471.

will, the ordinary class-closing rule in *Andrews* v. *Partington* would have closed the class at the end of the preliminary period of twenty-one years, since Archibald (by reaching twenty-one) had already become qualified to take. Accordingly, "although with considerable misgivings," the learned judge held that the class was now closed and that the deceased Archibald's estate was solely entitled to the fund.[69]

Acceleration of remainder

The difficulty, of course, about *Re Chartres*, is that an event which happened after the testator died was there permitted to accelerate the date of distribution which he had indicated in his will. It was already clear, however, that the court is inclined to accelerate a *vested remainder*, or even a contingent remainder if and when it eventually vests, if the life interest which precedes it fails or determines prematurely[70]; and that, to this end, any words which introduce the remainder—such as "and after the death of the said A"—are inclined to be construed (at any rate in a will) as meaning only "if and when A's life interest fails or ends."[71] And there had already been at least one English case (subsequently followed by an Irish decision), in which—though judge and counsel in *Re Chartres* were seemingly unaware of it—this accelerating of a class gift in remainder had been held to accelerate also the closing of the class.[72]

[69] *Ibid.*, at pp. 478–479. Some at least of these "misgivings" were evidently due to the fact that, in the result, the fund went (under Archibald's will) to Richard; whereas the original testator, by inserting in his own will a forfeiture clause (concerned, apparently, with religious belief) had left Richard nothing: see *ibid.*, pp. 467, 471, 479.

[70] In *Lainson* v. *Lainson* (1853) 18 Beav. 1; affd. 5 D.M. & G. 754; where a remainder in tail (not a class gift) was held to be accelerated by the revocation by codicil of its preceding life interest, Romilly M.R. held that the words "from and after J.L.'s decease" meant "from and after the determination of his [life] estate by death or otherwise." In *Eavestaff* v. *Austin* (1854) 19 Beav. 591, the revocation of a preceding life interest in personalty was held by Romilly M.R. to accelerate a remainder to a class. And in *Jull* v. *Jacobs* (1876) 3 Ch.D. 703, where Louisa's preceding life interest in realty and personalty failed because she had attested the testator's will, Wickens V.-C. held that the remainder, to be divided "after her decease . . . between her children," was likewise accelerated. But where there is as yet no one having a vested interest in remainder no acceleration occurs until there is: *Re Townsend's Estate* (1886) 34 Ch.D. 357 (residuary gift to A for life and after his death to his children equally: A's wife attested the will and as yet A has no child: *held*, by Chitty J., the income until A has a child went as on intestacy): see also *Re Taylor* [1957] 1 W.L.R. 1043, 1049, revealing and applying an implication in Chitty J.'s judgment (*supra*) that, if a child is eventually born to A, the remainder to A's children will then be accelerated because it then will have become vested.

[71] See *Re Flower's Settlement Trusts* [1957] 1 W.L.R. 401, C.A., at p. 405; also note 74, *post*.

[72] 68 L.T. 20. This decision was followed and applied in *Re Crothers' Trusts* [1915] 1 I.R. 53 (bequest of income of fund to widow for life so long

The case in point was *Re Johnson* (1893)[72] in which the testator by his will had devised his house to his son George for life, with remainder to George's wife Emma for life, with remainder "after the death of the survivor of them" to trustees for sale upon trust for "all my children who shall then be living." By a later codicil, the testator afterwards *revoked* the life interests of George and Emma. Stirling J., following earlier cases,[73] held that the words "after the death of the survivor of them" must be taken as merely indicating the order of the limitations; and that consequently the trust for sale and its class gift operated at once, without waiting for George and Emma to die. Then, proceeding a step further than the earlier cases were thought to have gone, he held also that the class therefore closed at once, in favour of all the testator's children now living—including, presumably, George.

In 1957, several cases on acceleration were reported. They show that a vested remainder after a life interest may be accelerated if the life interest is *disclaimed*.[74] An effective disclaimer, made before one has done anything which implies that one has accepted the gift in question, nullifies the gift *ab initio*.[75] Consequently, if he to whom a life interest is devised or bequeathed disclaims

as she remain unmarried, and on her death the fund to be divided between the members of a specified class "then living": she remarried: *held*, both the gift to the class and the date for ascertaining the class were accelerated.

[73] See *Lainson* v. *Lainson* (1853) and *Eavestaff* v. *Austin* (1854) in note 70, *supra*. As to the former, Stirling J. quoted the judgment of Turner L.J. (5 De G.M. & G., at p. 756) who had said in effect that prima facie such phrases as "from and after the death of A" (the life tenant) are to be understood as merely denoting the order of succession of the limitations.

[74] *Re Flower's Settlement Trusts* [1957] 1 W.L.R. 401, C.A. (principle not applied where discretionary trusts throughout a settlor's lifetime were void for uncertainty), states at p. 405 the general principle, that it applies equally to realty and to personalty, and *semble* that in settlements *inter vivos*—unlike wills—it needs some support from the context.

Re Hatfeild's Will Trusts [1957] 3 W.L.R. 28: devise to A for life, remainder to his sons successively in tail, remainder to B; A disclaims, having as yet no son: *held* (Harman J.), income pending the birth of a son is payable to B.

Re Davies [1957] 1 W.L.R. 922: disclaimer by life-tenant of share of residue "to be hers for life and then divided equally between her issue."

Re Taylor [1957] 1 W.L.R. 1043: disclaimer by life-tenant of residue and "after his death" upon trust for B and C or "such of them as shall be living at the death of myself and . . ." the life-tenant, with a divesting clause in favour of their issue in case B or C should die, leaving issue, before the testator's brother. *Held* (Upjohn J.): the rule as to acceleration applies in favour of vested remainders even if they are subject to be divested.

[75] See, *e.g.*, *Re Wimperis* [1914] 1 Ch. 502; also *Re Flower's Settlement Trusts*, *supra*, at p. 405 ". . . or if the gift does not take effect because it is disclaimed." Contrast a *release*, as in *Re Chartres*, *ante* p. 56. A release or a surrender (unlike a disclaimer), is not retrospective: see, *e.g.*, Hood and Challis, *Property Acts*, 8th ed., 284. For the old strict meaning of these words, see Co. Litt., ff. 102a, 337b; also Hargreaves' note 294 thereto.

it effectively, the result is the same (except, it seems, as regards death duties) [75a] as though the testator himself had revoked it.

In only one of the 1957 cases was there a straightforward remainder to a class. This was *Re Davies* [76] in which the testatrix had given a share of her residuary estate to her stepdaughter and had directed that this share was to be "hers for life and then to be divided equally among her issue." Thereupon, the stepdaughter executed a deed of disclaimer, reciting that she had never in any wise accepted the benefit of this life interest. She was, at the time when the testatrix died, a widow with three children and had as yet no other issue. Vaisey J., following *Re Johnson* (*ante*, p. 58), held that the disclaimer accelerated the remainder and closed the class at the testatrix's death. The three children, therefore, took absolutely, "to the total and final exclusion of" any further issue that might afterwards be born.

This decision, it may be added, was discussed with approval and applied by Upjohn J. a few days later, in *Re Taylor*.[77] There although the remainder accelerated was a gift to two named individuals—not a class gift—it was liable to be divested (in certain events) in favour of their "issue," and so involved a possibility that the acceleration might close prematurely the class of issue who might take in their stead. Upjohn J. was evidently content that this should be so.

In the course of these two judgments, moreover, each of their lordships mentioned two earlier cases on the acceleration of a class gift in remainder, namely, *Jull* v. *Jacobs* (1876) and *Re Townsend's Estate* (1886) [78]; and the opinion was expressed that each of those cases had decided, by implication, that the acceleration of their respective remainders had accelerated the closing of the class in remainder, or would do so if and as soon as the remainder became vested.[79] [In those two earlier cases, the preceding life interest for A had become a nullity because A (or A's spouse) had attested the will.]

[75a] As a result of section 45 (2) of the Finance Act, 1940, a legatee disclaiming an absolute legacy is deemed, for purposes of estate duty, to make a gift to the residuary legatee: *Re Stratton's Disclaimer*, [1958] Ch. 42, C.A. The *ratio decidendi* there (that the disclaimer extinguishes a "right" and thereby confers a benefit) seems wide enough to cover a disclaimer of a life interest. So also, perhaps, do the words of section 43, which concerns life interests "disposed of or determined, whether by surrender . . . or in any other manner"; but contrast counsel's assertion to the contrary in *Re Stratton's Disclaimer*, *supra*, at p. 46.

[76] [1957] 1 W.L.R. 922.

[77] [1957] 1 W.L.R. 1043; summarised *ante*, note 74.

[78] See *ante*, note 70, where each of them is summarised.

[79] Upjohn J. said so ([1957] 1 W.L.R. at p. 1048) as regards *Jull* v. *Jacobs*; Vaisey J. said so (*ibid.*, at p. 926) as regards both *Jull* v. *Jacobs* and *Re Townsend's Estate*.

The scope of the acceleration cases

It seems therefore that the present situation as regards the impact of the doctrine of acceleration upon class-gifts is as follows: (a) There are now three, or perhaps five, decisions to the effect that when a remainder to a class is accelerated because the preceding life interest is for some reason *void ab initio* the closing of the class is accelerated too; and the most recent of these decisions (*Re Davies* and *Re Taylor*) have extended this phenomenon to a retrospective disclaimer executed by the life tenant after the testator is dead—and therefore after the will had come into force. (b) There has also been one decision, rather dubious perhaps, that when a gift to a class is accelerated because the donee of a preceding power of appointment (which had priority to and might displace the class gift) destroys that power, not retrospectively, by executing a release, the closing of the class is likewise accelerated. That decision, *Re Chartres* (1927), *supra*, seems never yet to have been followed or even cited. (c) There would seem, as yet, to be no direct authority on the question whether, when a remainder to a class is accelerated because the owner of the preceding life interest has merely *released* or—perhaps the more appropriate word for him—"*surrendered*" his life interest (so that it terminates prematurely but is not avoided *ab initio*), the class will close. On principle, presumably, it should.[80]

4. Class Gift to be Divided When the Youngest Attains Twenty-One

As we have seen, a class gift to such members of the class as attain twenty-one enables him who first reaches twenty-one to say "I have now an unconditional right to be paid something." It produces the dilemma that one must pay him some share of the fund at a time when one cannot know, unless the class is closed, the size or even the minimum size of his share. That dilemma does not arise, however, when a class gift, such as a bequest to the children of A, is expressed to be payable when the *youngest*

[80] The remainder is accelerated because the courts construe it (at least in a will) "as a gift taking effect on the death of the first taker or on any earlier failure or determination of his interest": *Re Flower's Settlement Trusts* [1957] 1 W.L.R. 401, 405, *per* Jenkins L.J. This seems necessarily to imply, when the remainder is to a class, that the testator is assumed to have *intended* that any premature determination of the life interest would advance the date of distribution among the class. Moreover, the fact that a release or surrender (unlike a disclaimer) merely terminates the preceding life estate without making it void *ab initio*, seems to be no objection: see the Irish decision, *Re Crothers' Trusts* [1915] 1 I.R. 53, summarised *ante*, note 72. For the words "release" and "surrender," see note 75, *ante*.

reaches twenty-one—or, which is virtually the same thing, when *all* of them [81] have reached twenty-one.[82] Here the stated date for payment causes no difficulty or dilemma, for it is a date at which one is bound to know how many members are in the class.[83] There may be, it is true, a question whether the testator is referring only to the *present* children of A. But that question is not likely to cause real difficulty; [84] for, as we have seen, gifts to "children" mean prima facie *all* the children.[85] To delay distribution until one ultimately discovers who is A's youngest child and until one knows whether he reaches or fails to reach twenty-one, is doubtless highly inconvenient for A's other children, especially when one remembers the law's assumption (not yet overturned by Parliament) that A, however old, is fertile still. Nevertheless, in this type of case, the testator's words make such delay unavoidable; and there is here no artificial rule which can close the class at some earlier moment.

It seems that *Mainwaring* v. *Beevor* (1849) [86] is the earliest authority on this point. There the testator had left the residue of his property to trustees upon trust to use the income at their discretion—investing any surplus—for the maintenance of "all and every of" his grandchildren whilst they should severally be under twenty-one, and had directed that the capital be divided equally between them when all of them have reached twenty-one. Now, twelve years after his death, there are as yet five grandchildren, all of whom have reached twenty-one. But their father is still alive, and so is the testator's other child, James (a bachelor). Wigram V.-C. held accordingly (as to the capital) that these five

[81] Presumably "*all* of them" must be construed here to mean payable when all who in fact live long enough reach twenty-one: see the decision in *Armitage* v. *Williams*, *post*, p. 62, and note 88.

[82] A possible difference exists in relation to the question whether a child, who after the testator's death dies under twenty-one, can be said to have already acquired a vested interest so that, when payment ultimately becomes due, his estate will be entitled to share in the fund. It would appear, however, that, whether the gift is to be divided when "all" or when the "youngest" shall have reached twenty-one, there is no presumption that a child who dies under twenty-one obtains no vested interest: see *Re Lodwig* [1916] 2 Ch. 26, C.A., reviewing previous decisions to the contrary. The presumption in favour of early vesting (*ante*, p. 47), formerly applicable only to realty, seems now to apply in some degree to personalty (*ante*, note 37).

[83] But see the preceding footnote for a possible difficulty on the question of vesting.

[84] See Wigram V.-C. in *Mainwaring* v. *Beevor* (1849) 8 Hare 44, at p. 48, commenting adversely upon *Elliott* v. *Elliott* (1841) 12 Sim. 276—a decision in which a wrong construction was given on this point in order to evade the perpetuity rule. See also Upjohn J. in *Re Ransome* [1957] Ch. 348, at pp. 359–360, commenting likewise.

[85] *Ante*, note 13.

[86] 8 Hare 44. It was mentioned with approval, as an example of words which oust the class-closing rules, by Evershed M.R. in *Re Bleckly* [1951] Ch. 740, at p. 750.

grandchildren must "wait for an indefinite time so long as other [grand]children may continue to be born." [As regards the *income* of the fund in the meantime, however, he declared that these five were entitled to share it between them "until some other such [grand]child is born"; [87] for the will had said that the interest of each grandchild was to become vested on his attaining twenty-one.[87]]

It would appear that *Mainwaring* v. *Beevor* was followed ten years later in *Armitage* v. *Williams* (1859), where the income of a fund was to be used for the education of the children of A and B, "and on their attaining twenty-one the whole to be divided equally among them." A and B outlived the testator and, before they died, produced between them a total of eighteen children—some of whom had died without reaching twenty-one. Romilly M.R. held that each of the eighteen children, or his executors in his stead, took an equal share of the fund as soon as the youngest (of those who lived long enough to do so) reached twenty-one.[88]

[87] Presumably, at the birth of another grandchild, the will's provision for maintaining him and investing any surplus income would intervene. Although this provision perhaps involved an invalid direction to accumulate, it seems that it merely directed to be done out of the whole income what the court would itself have directed to be done out of the income of the infant grandchild's presumptive share of the fund, and so was to that extent at least effective. See *Re Ransome* [1957] Ch. 348, 362, for the "well-known rule of convenience that, where the share of one or another member of a class has vested, the income of that share may be paid to one or more members of that class, notwithstanding that the class is capable of increase or decrease. It has no application to the case where no share can be said with certainty to have vested." Under this rule, the birth of another grandchild would ordinarily merely reduce the shares of the income payable to each of the five adults, from one-fifth to one-sixth: the remaining one-sixth being available, *semble*, for the new grandchild's maintenance, and any surplus thereof being accumulated: see *Re Holford* [1894] 3 Ch. 30 (Chitty J. and C.A.); *Re Maber* [1928] Ch. 88. When there is a statutory provision for maintenance out of income, the statute itself directs that surplus income shall be accumulated during the infant's minority (Trustee Act, 1925, s.31 (2), formerly Conveyancing Act, 1881, s. 43 (2)). And such an accumulation, whether directed by statute or by the general law (above), is now, by virtue of section 165 of the Law of Property Act, 1925, specifically excluded from the province of the statutory rules against excessive accumulations. The rights to income, when a member of a contingent class obtains a vested interest and nevertheless the class has not closed, were stated very clearly by Romer J. in *Re King* [1928] Ch. 330, *e.g.*, at pp. 335–336; but *cf.* note 95, *post*.

[88] 27 Beav. 346. There is no definite rule that death under twenty-one disqualifies in such a case: see Hawkins on *Wills*, 3rd ed., p. 278, note. Romilly M.R.'s judgment in *Armitage* v. *Williams* was very briefly reported, without mentioning any reasons or authorities. But counsel who had contended successfully for eighteen shares had cited *Mainwaring* v. *Beevor* whereas counsel who had contended unsuccessfully for ten shares (children born before the first child reached twenty-one) had cited *Andrews* v. *Partington*. Contrast *Gooch* v. *Gooch* (1853) 3 De G.M. & G. 366, in which Lord Cranworth's judgment (in a perpetuity case), though very fully reported, had likewise mentioned no rules or authorities—seeking merely the intentions

Finally, we have the recent decision of Upjohn J., in *Re Ransome* (1957),[89] in which both this and several other matters mentioned in this article were considered. The testatrix had bequeathed a fund upon trust (i) to use the income at the trustee's discretion towards the education of Robert's child or children, accumulating any surplus income, until Robert's youngest child should attain twenty-one years of age; (ii) to divide the fund and its accumulations of income, when the youngest child attains twenty-one, among such of Robert's children " as shall then be living." At the time of the hearing, Robert was still alive and as yet had only one child, David; and David had recently attained twenty-one. David's counsel argued unsuccessfully that David is, at present, the youngest (though also the eldest) child, and that the whole fund—or at least the whole income of the fund for the time being—should now be paid to him.

The judgment of Upjohn J. decided, *inter alia*, the following points. (i) The " children " of Robert prima facie means *all* the children, present and future, of Robert; (ii) there is nothing in the context here to displace that primary meaning; (iii) hence the class of children is still open. Moreover (iv) David's interest here, in spite of his having reached twenty-one, is still contingent, because the words of the gift specifically restricted it to those children who will be living when the youngest reaches twenty-one: (v) none of the class-closing rules (such as the rule in *Andrews* v. *Partington*) closes a case until some member of the class can say that his share—though as yet unascertained in amount—is now " absolutely vested in interest and possession ":[90] hence (vi) David has no right as yet to any part of the capital of the fund.[91]

His lordship then dealt with the problem caused by the fact that the testatrix had directed the accumulation of all surplus income until the youngest child of Robert should reach twenty-one. That direction plainly exceeded the statutory limits: indeed

displayed by the testator's will. There a distribution to be made, when Mary's youngest child to reach twenty-one reaches twenty-one, among those of Mary's children who are then living, was *held* (in the light of a preceding sentence) to refer only to the youngest child at the time when some elder child had reached twenty-one: so it meant that the class was to *close* as soon as some child reached twenty-one, but was not to be *distributed* until the youngest child then living reached twenty-one.

89 [1957] Ch. 348.

90 *Ibid.*, pp. 358–361, at p. 361.

91 One would have thought that this decision could have been reached, irrespective of the point that David's rights are still contingent, by merely following *Mainwaring* v. *Beevor* (*ante*, p. 61). There the class gift of residue when all reach twenty-one was described by Wigram V.-C. (at p. 49) as a gift when the youngest reaches twenty-one; yet the question whether those members who were already twenty-one had vested or contingent rights was (as to the capital) completely ignored, as though immaterial.

it might even involve continuously accumulating throughout Robert's lifetime and also for twenty-one years thereafter. The question which of the permissible statutory periods should replace (or set a limit to) it, was decided in favour of the period of twenty-one years from the testator's death. This was not an easy decision, since the normal test, whereby one selects that statutory period which best "fits in" with the provisions of the will and the surrounding facts, did not help one here.[92]

This twenty-one-year period had expired in 1956. The direction to accumulate having thus come to a premature end, the question arose what should be done with any surplus *income* that might arise thereafter, whilst the trustees were still awaiting the time for distributing the capital of the fund and its past accumulations. As we have seen (*ante*, p. 51) one must find "the person or persons who would have been entitled thereto if such accumulation had not been directed." David's counsel stoutly contended[93] that David is that person; and those pages of the decision in which his lordship successively considered and rejected each of counsel's arguments to that effect[94] are perhaps the most fascinating part of this notable judgment. The reasoning was as follows:

> (i) The fund here was one which the testatrix, by a codicil, had directed to be set aside (for the benefit of Robert's children—of whom David was one) out of a residuary trust fund which she had created by her will: the contingent gift of it (to those alive when the youngest should reach twenty-one) therefore carried its intermediate income; for it is either a contingent residuary or a contingent specific bequest. That means only, however, that its income during the contingency is to be accumulated and added to the fund, not that anyone (such as David) can claim that income for himself whilst his rights are still contingent.
>
> (ii) In spite of a passage in Jarman on *Wills*, the rule

[92] *Re Ransome* [1937] Ch. at p. 361. Where, as happened in *Re Ransome*, a will directs accumulation to begin *at once* the period selected is either twenty-one years from testator's death or (if relevant) the minority of some person or persons then in being or *en ventre*. Thus, in *Re Watts' Will Trusts* [1936] 2 All E.R. 1555 (direction to accumulate surplus income "during the minority of the children or child of Gerald," Gerald and three infant children having outlived the testator), the latter period was selected: but in *Re Ransome* neither of them seemed really appropriate. See, further, *Jagger* v. *Jagger* (1883) 25 Ch.D. 729 (settlement *inter vivos*); *Re Cattell* [1907] 1 Ch. 567; [1914] 1 Ch. 177, C.A. ("accumulate the share of any minor child for the time being"—4th period selected): also Megarry and Wade, *Real Property*, 251 *et seq.*

[93] At pp. 354, 356.

[94] At pp. 362–366.

of convenience which allows to a contingent member of a class the income of his presumptive share does not apply until the share of at least one member has become vested.[95]

(iii) An ingenious argument, based on the "shall" clause of section 31 (1) of the Trustee Act, 1925, failed likewise. Admittedly David might be within the benefit of that clause; for he is a "person [who] on attaining the age of twenty-one years has not a vested interest in such income." But the Court of Appeal had held, twenty years ago, that a direction in the will that the income is to be accumulated amounts to a "contrary intention" which, by virtue of section 69 (2) of that Act, negatives this clause.[96] Accordingly, the fact that the present testatrix had directed the income to be accumulated seemed to show unquestionably that section 31 of the Act does not give that income to David. David's counsel, however, raised the new point that the testatrix here had directed as *excessive* accumulation, the valid part of which had now expired. How could the *invalid* part of the direction to accumulate negative effectively the "shall" clause of section 31? To this, Upjohn J. replied, *inter alia*, that it is clearly settled that, when applying the statutory rules against excessive accumulation, "you must [first] construe the will as it stands without regard to the statutory limitation"; see *ante*, p. 52. Hence even the invalid part of an excessive direction to accumulate is a sufficient indication of contrary intention to exclude the rights to income conferred by the "shall" clause of section 31.[97]

Where, then, did the income go during the excessive part of this period of accumulation directed by Mrs. Ransome's codicil? Having held that David cannot have it, one might suppose that the learned judge would have held that this undisposed-of income, produced by the fund which Mrs. Ransome's codicil had withdrawn from the residuary gift contained in her will, should be paid to the persons entitled on her intestacy. But here the facts were peculiar. The codicil had not *expressly* revoked anything contained

[95] At p. 362. His Lordship's comment here, as reported, seems to say also that, even where there is one vested member of the class, only the income of *his* presumptive share can be paid out, whether to him or for the benefit of any contingent member. This dictum (if such it was) does not seem to be consistent with the earlier authorities: *ante*, note 87.

[96] *Re Turner's Will Trusts* [1937] Ch. 15.

[97] *Re Ransome, supra*, at p. 365. But query whether the old rule about first construing the will without regard to the statutory limits upon accumulating (*ante*, p. 52) should be extended as far as this. His lordship's other answer to counsel's argument was (at p. 366) that section 69 (2) of the Trustee Act requires only a contrary *intention*, not a contrary *provision*, in order to negative statutory powers such as those conferred by section 31.

in the residuary gift: it had merely taken some assets out of the will's residuary gift (itself a trust fund) in order to form a separate fund for Robert's children. And codicils must be so construed as to interfere with the will as little as possible.[98] Accordingly, this income which the codicil had failed to dispose of fell back into the will's residuary gift from which the codicil's fund had been taken.[99]

5. Conclusions

1. When a gift to a class is preceded by a direction to accumulate the income of the gift for a certain period, the class-closing rules do not close the class until that period has expired. This is so even if the directed period of accumulation exceeds the statutory limits; and even if the members of the class for the time being purport to countermand the direction to accumulate. [*Ante*, pp. 48–55.]

2. When a gift to a class is preceded by a life interest for B, an act by B which completely nullifies his life interest *ab initio*—or even, it would seem, an act by B which merely brings his life interest to a premature end—may accelerate the closing of the class, and, if the gift is by will, ordinarily does so. [*Ante*, pp. 55–60.]

3. There is no class-closing rule for a gift which is not to be distributed among the class until *all* of them have reached twenty-one, or (which means virtually the same thing) until the *youngest* of them reaches twenty-one. (*a*) In such a case, therefore, the member who first reaches twenty-one is not yet entitled to be paid any part of the gift. (*b*) Nevertheless, he appears to be entitled to be paid henceforth the *income* attributable to what is, for the time being, his presumptive share of the gift (*Mainwaring* v. *Beevor*). And this is probably so nowadays (Trustee Act, 1925, s. 31 (2)) even if his rights are as yet contingent—*e.g.*, upon his still being alive when the gift is ultimately divided. But it is not so if, his rights being as yet contingent, the gift shows a contrary intention; and a direction to accumulate the income of the gift until all have reached twenty-one is a sufficient contrary contention for this purpose, even if (as in *Re Ransome*) the direction to accumulate exceeds the statutory limits. [*Ante*, pp. 60–65.]

[98] *Re Ransome*, *supra*, at pp. 366–367, citing *Ward* v. *Van der Loeff* [1924] A.C. 653, 665.

[99] Counsel for those entitled to the residue, at p. 355, had argued for this result both on the grounds stated by the learned judge and on the interesting ground that (the residue itself being a trust fund), in so far as the codicil's trusts have failed, "the original trusts take effect on the principle of *Lassence* v. *Tierney*." For the rule in *Lassence* v. *Tierney* see *ante*, note 33.

ENGLISH CONTRACT PROBLEMS IN INDIAN CODE AND CASE LAW

R. N. Gooderson

There is nothing indigenous about the Indian Contract Act of 1872 (hereinafter referred to as "the Act"), which is a comprehensive though not necessarily exhaustive code of the subject.[1] According to the eighteenth-century charters, which established courts of justice for the three Presidency towns of Calcutta, Madras and Bombay, the law there applicable was the English common and statute law then in force, so far as it was appropriate to Indian circumstances. Elsewhere it was the practice to have recourse to justice, equity and good conscience. Appeal to these three precepts was also to be made in the Presidency towns themselves in case no specific rule existed.[2] This was the state of the law of contract in 1866, as briefly described by the Indian Law Commissioners in their report.[3] This commission, which prepared the first draft of the Act, had been appointed in England in 1864, with Lord Romilly M.R. as chairman. The other members were W. M. James Q.C., the Chancery leader shortly to become James L.J., Sir Edward Ryan, formerly Chief Justice of Bengal, who at this time often sat as a member of the Judicial Committee of the Privy Council in Indian appeals, Robert Lowe, as Lord Sherbrooke then was, a politician, later Chancellor of the Exchequer and Home Secretary, J. M. Macleod, a member of the Indian Civil Service, and John Henderson, barrister. The commission sat in London, and produced a draft report in 1866. This had still not become law by 1870, largely because of the opposition of Sir Henry Maine, then Law Member of the Governor-General's Council, to the proposals as to specific performance. These followed the practice of the Chancery courts, with which two of the Commissioners were very familiar, but were too timid for Maine, who pressed for a wide extension of the remedy. In 1869, Maine ceased to be Law Member, giving way to Sir Fitzjames Stephen. As even then nothing was done to implement their recommendations, the commission resigned in 1870. The draft Act, as it left their hands, was mainly contemporary

[1] See n. 7 (*infra*).
[2] Bengal Regulation III of 1793, s. 21.
[3] Second Report of July 28, 1866, p. 7.

English law, except for a revolutionary proposal that would in effect have made the whole of India market overt.[4] Further consideration was now given to the draft in India, where it was revised and elaborated by the Legislative Department, a revision notable for the introduction of certain provisions from Dudley Field's draft New York Code.[5] Stephen himself drafted what were to form the first nine sections of the Act, a valuable contribution analysing the basic concepts of the subject, the need for which is exemplified by a recent plea for yet further elucidation of these fundamental topics.[6] The revised and expanded draft became law in 1872, with the market overt proposal omitted, and the subject of specific performance excluded *in toto*: the latter was subsequently dealt with in a separate enactment, the Specific Relief Act, 1877, which embodied the original and conservative suggestions of the Commissioners.

The Act of 1872 was largely a codification of the existing English law, involving some departures from it, some of which will shortly be examined in detail, but by and large recognisable as the formulation of established principles of common law and equity. The preamble to the Act indicates that it was not intended to be exhaustive, and this was the interpretation in fact placed upon it by the Privy Council in 1891.[7] The Commissioners in their report had expressed the hope that the courts would not resort to any other system of law for an authoritative solution of an ambiguity, but would in such cases be entirely guided by regard to justice, equity and good conscience.[8] But at that very time, the idea was beginning to gain ground that the rules of justice, equity and good conscience were to be culled from English law, if found applicable to Indian society and circumstances.[9] The Privy Council approved this view in 1887,[10] so that it has usually happened that the interstices have been filled from the rules of English law. Indian judges have sometimes taken this policy to extremes, and neglected the plain meaning of the words of the legislature, in order to import

[4] Draft s. 81: " The ownership of goods may be acquired by buying them from any person who is in possession of them, provided that the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession has no right to sell them."

[5] Provisions not adopted in New York, though in force in some other states. They invariably received acrimonious criticism from Sir Frederick Pollock.

[6] Professor Satyanarayana Murty of Cuttack in A.I.R. 1951 Journal 40, 42.

[7] *Irrawaddy Flotilla Co.* v. *Bugwandas*, 18 I.A. 121.

[8] Concluding para. of report, p. 10.

[9] Rankin, *Background to Indian Law* (1946) 38, citing Sir Richard Couch in *Dada* v. *Babaji* (1865) 2 Bom.H.C. 38, interpreting Lord Kingsdown's judgment in *Varden* v. *Luckpathy* (1862) 9 Moo.I.A. 303.

[10] *Waghela Rajsanji* v. *Sheikh Masludin*, 14 I.A. 89, 96.

English legal principles. An instance springs to mind in the case of section 70, one of the fasciculus of sections dealing with quasi-contract,[11] regarding which there has been a difference of opinion among Indian courts, as to the extent to which *negotiorum gestio* is part of Indian law. The section runs as follows—

> " Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

One limitation on the Roman law doctrine is immediately apparent in that the action of the plaintiff must have resulted in actual benefit to the defendant.[12] The moot point is whether the English requirement that the services must have been rendered in response to a request express or implied, apart from the exceptional case of salvage at sea, must be imported. In *Yogambal* v. *Naina Pillai*,[13] a bench of the Madras High Court held, in conformity with the opinion of Bowen and Fry L.JJ. in *Falcke* v. *Scottish Imperial Insurance*,[14] that a person can be said to enjoy a benefit under section 70 only when he has the option of accepting or declining. On the other hand, another bench of the same court, in *Chandra Deo* v. *Srinivasacharlu*, took the view that consideration of justice, equity and good conscience, and reference to the plain and beneficent provisions of the section itself, rather than to English precedents, compelled an opposite conclusion.[15] On the analogous question whether the principle of maritime salvage can apply to a charge on land, a Madras full bench in *Rajah of Vizianagram* v. *Rajah Setricharla*,[16] preferred to adopt a principle, said by Lord St. Leonards L.C. to be common in Ireland,[17] in favour of such a charge. Thus despite the regrets of Fry L.J. that any such principle should ever have crossed the Irish Sea,[18] it has also safely traversed the Indian Ocean, though not the Ganges, for in Allahabad a full bench has adhered to the English

11 Chapter V, ss. 68–73, bearing the rubric: " Of certain relations resembling those created by contract."

12 Whitley Stokes, *The Anglo-Indian Codes* (1887) Vol. 1, p. 533.

13 (1909) 33 Mad. 15. A bench is a court of two judges, a full bench of at least three.

14 (1886) 34 Ch.D. 234, 249, 254.

15 (1915) 38 Mad. 235, 244. (It will already be apparent to the reader that the names of Indian litigants do not flow trippingly off an English tongue. He may take comfort from the practice common even in an Indian court of citing a precedent by reference to the volume and page of the report, rather than to the names of the parties.)

16 (1903) 26 Mad. 686, 723.

17 *Re Tharp* (1852) 2 Sm. & Giff. 578.

18 34 Ch.D. at p. 254 (*supra*).

rule,[19] despite a powerful dissenting judgement from Mahmood J., supporting his opinion by reference to the needs of a sub-continent as compared with a sea-girt island, that might be content with a rule purely of *maritime* salvage, and also by quotations from Bentham.[20]

In performing its duty of following the dictates of justice, equity and good conscience, an Indian court has been known to reject an English case if it has come under cogent textbook criticism,[21] or has been abrogated in England by statute. As to the latter point, there was long doubt and difference of opinion whether the rule in *Merryweather* v. *Nixan*,[22] of no contribution between tortfeasors, applied in India, but an Allahabad full bench regards the matter as settled by its abolition in England in 1935 by statute.[23]

Despite the attainment of independence in 1947, the abolition of appeals from India to the Privy Council in 1950, and the setting up of a Supreme Court in the same year, there does not as yet seem any indication of a change in the attitude of Indian courts towards English decisions in the law of contract. The probability is that for a time at any rate the new influences will make themselves apparent only at the periphery. There will no doubt be a growing tendency to read the actual words of the great codes as they stand, rather than in the light of English decisions, at all events where the matter has not already been threshed out by Indian courts. It is also to be anticipated that in applying the rules of justice, equity and good conscience, Indian judges will evince just as much interest in cases from other common law countries as in those from England. At present there is as much deference as ever to decisions of the Privy Council in Indian appeals, and to doctrines of English law already accepted by Indian courts. Interest in recent English decisions is enormous. During 1955, the *All India Reporter*, the most comprehensive and widely used of the unofficial reports, tried to meet this demand by publishing in its volumes the headnotes of current English cases.[24] It is very noticeable that the Indian courts are almost always well aware of the latest English ruling.

[19] *Seth Chitor Mal* v. *Shib Lal* (1892) 14 All. 273.
[20] *Ibid.* at pp. 311, 313.
[21] See rejection of *Gibbons* v. *Proctor* (*infra*) nn. 37, 38.
[22] (1799) T.R. 186.
[23] *Dharni Dhar* v. *Chandra Shekhar*, A.I.R. 1951 All. 774, 777. (Previously rule applied in Allahabad: *Parbhoo Dayal* v. *Dwarka Prasad*, A.I.R. 1932 All. 334 (bench); in Patna: *Bishambardeo Waryam Singh* v. *Hitnarayan Singh*, A.I.R. 1936 Pat. 49 (bench); and in Madras: *Yeynarayana* v. *Yagannadha Rao*, A.I.R. 1932 Mad. 1; though rejected in Nagpur: *Khushalrao* v. *Bapurao*, A.I.R. 1942 Nag. 52, and in *Venkata Rao* v. *Venkayya*, A.I.R. 1943 Mad. 38.)
[24] In notes of unreported cases (N.U.C.). This experiment was discontinued on the ground that insufficient detail could be given (A.I.R. 1956 Journal 1), a wise decision as a little headnote learning is a dangerous thing.

The original Act dealt with two particular types of contract, partnership and sale of goods, that are now contained in separate Acts,[25] and it still deals with guarantee, bailment and agency in considerable detail. In these notes, an attempt will be made to bring out the salient differences between the Indian and English Law of Contract in some of the general subjects.

Offer (Proposal) and Acceptance

There are four important differences from English law, three of which spring from the Act, and one from a judicial decision.

Section 4 lays down a new rule as to the moment of completion of a contract when the parties are at a distance. In 1872 there was still a difference of judicial opinion in England on this point. Was the contract complete when the acceptance was posted, or only when it came to the knowledge of the offeror (proposer)? In 1879 the Court of Appeal by a majority approved the former view,[26] but in the meantime a compromise had been adopted in the Act, whereby as against the offeror the agreement is complete when put in a course of transmission, but against the offeree only when it comes to the knowledge of the offeror: section 4. One advantage of this solution is that it solves the thorny problem, perplexing to English lawyers, whether a revocation of an acceptance arriving before the acceptance itself is effective.[27] In India it appears from section 4 that such a revocation will be efficacious, and this is expressly confirmed by section 5. Despite the advantage of a clear answer to this riddle, there is an air of unreality in the operation of the section where the acceptance is lost in the post. Here the offeror, who does not know of the acceptance, is bound, whereas the acceptor who has posted it is not bound.[28]

Section 6 deals with methods of revocation, and in subsection (1) lays down that communication of notice of revocation must be by the proposer (*i.e.*, the offeror) to the other party. This would seem to exclude indirect communication of revocation, such as was

25 Indian Sale of Goods Act, 1930, repealing ss. 76–123 of the original Act, and Indian Partnership Act, 1932, repealing ss. 239–266.

26 *Household Fire Insurance* v. *Grant*, 4 Ex.D. 216.

27 Held ineffective in *Wenkheim* v. *Arndt*, 1 J.R. 73 (N.Z.), and by Benjamin, *Sale*, 8th ed. (1950), 83; Pollock, *Contracts*, 13th ed. (1950), 28. Held effective by Bramwell L.J. (diss.) in 4 Ex.D. 216, 235–236 (*supra*), and by Salmond and Williams, *Contracts*, 2nd ed. (1945), 86; and Gloag, *Contracts*, 2nd ed. (1929), 38, who cites *Dunmore* v. *Alexander* (1830) 9 Sh. & D. 190, but this gives no help, as the majority of the court seem to treat Lady D.'s letter as an offer not an acceptance. Gloag relies upon a laconic and ambiguous remark at the beginning of Lord Balgray's judgment, and rejects the later and lucid part as irrelevant. Yet Lord Gillies, in concurring, expressly repeats the so-called irrelevant part.

28 Professor S. Murty, A.I.R. 1951 Journal 40, 42.

held to be operative in *Dickinson* v. *Dodds*.[29] This was probably the first reported case of its kind, and came too late for its principle to be included expressly in the Act. It has, however, been argued by Cunningham and Shephard that the matter is covered by section 3,[30] which runs as follows—

> "The communication of proposals, the acceptance of proposals, and *the revocation of proposals* and acceptances, respectively, *are deemed to be made by any act* or omission *of the party* proposing, accepting or *revoking*, by which he intends to communicate such proposal, acceptance or revocation, or *which has the effect of communicating it*."

Reliance is placed upon the words italicised. The section is unhappily worded. There is a lack of consonance between the opening and concluding words of the section. The opening words do not purport to deal with communication of acceptances, or with communication of revocation, but only with communication of proposals. Yet the concluding words refer to intent to communicate not merely proposals, but also acceptances and revocation. The better view is that this section does not deal with communication of revocation at all. This is confirmed by the marginal note to the section, which in case the section was intended to deal with communication of acceptances and revocation as well as with communication of proposals should surely have run: "Communication of proposals, acceptances and revocations," and not as in the text: "Communication, acceptance and revocation of proposals." It is suggested that the sidewind by which the learned commentators seek to introduce the rule in *Dickinson* v. *Dodds* into India is far too feeble and contrary for the purpose.

Section 7 (2) enacts the following rule as to the form of acceptance—

> "If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance."

This provision clearly involves one departure from English law in the requirement that the offeror must raise a positive objection to an acceptance not in the prescribed form, whereas in England he could simply ignore it. English law is not very clear whether the slightest deviation from form will render an acceptance invalid.

[29] (1876) 2 Ch.D. 463.
[30] *Indian Contract Act*, 9th ed., 25.

In *Tinn* v. *Hoffman*, where the offeree was told to "reply by return of post," it was said that this referred to the time and not the manner of acceptance, and a reply by any other method equally expeditious would suffice,[31] but Cheshire and Fifoot observe that if the offeror had added the words "and by that method only," the result would be different.[32] That very case has arisen in India, and the validity of an acceptance upheld despite a variation from the form enjoined: *Surendra Nath* v. *Kedar Nath*.[33] There the offeree was told to accept by writing to F. at a Calcutta address, and by no other means. The offeree instead sent his agent to F. in person. The court held there was a concluded contract, holding that the offer must be construed in a reasonable and sensible manner. The decision has been criticised,[34] but it is submitted that an offeror ought to be held bound by an acceptance that complies substantially though not exactly with the prescribed terms, unless he can show that the deviation from precise compliance has damnified him. English authority is scanty, and the decision of the United States Supreme Court in *Eliason* v. *Henshaw*,[35] which is sometimes quoted in this context,[36] deals with the somewhat different situation of an acceptance sent to the wrong place, whereby the offeror did not receive it so quickly.

The need, under section 7 (2), for the offeror to raise actual protest to acceptances not in the prescribed form gives rise to some difficulty. The offeror must insist that "his proposal shall be accepted in the prescribed manner." Does this mean that the offeror is compelled to give a further extension of time for acceptance? Such a construction would lead to injustice, *e.g.*, in a case where the offeree indicates his acceptance at the very last moment permitted by the offer, but in the wrong form. Surely then the offeror should be at liberty to object to the form of acceptance, and to indicate that there can never be a binding contract, since the regular acceptance when received will inevitably be out of time. It is the use of the word "shall" that prompts this doubt, but it is presumably used in a peremptory rather than a future sense.

The final departure from English law under this head is the decision of Banerji J. in *Lalman Shukla* v. *Gauri Dutt* that the rule in *Gibbons* v. *Proctor*[37] that an act done in ignorance of a proposal

31 (1873) 29 L.T. 271, *per* Honyman J. at p. 274, *per* Brett J. at p. 278.
32 *Law of Contract*, 4th ed., 39; Winfield (1939) 55 L.Q.R. 499, 516.
33 A.I.R. 1936 Cal. 87 (bench). According to the American Restatement, para. 68, an acceptance inoperative when despatched is operative when received if received in time.
34 By Sir Maurice Gwyer in Pollock and Mulla, *Indian Contract Act*, 7th ed., 50.
35 (1822) 4 Wheat. 225.
36 Anson, *Law of Contract*, 20th ed. (1952) 41; Winfield, *op. cit.*, 516.
37 (1892) 64 L.T. 594.

(offer) can be an acceptance, is not part of the law of India. The learned judge's reason for rejecting the rule was that it had been criticised by textbooks in England and the United States.[38] The Act itself gives no specific guidance on the point.

Consideration

Under the Act, an agreement made without consideration is void: section 25. Consideration is defined in section 2 (d) in the following terms—

> "When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."

This definition is the work of Sir Fitzjames Stephen. Considering the source from which it sprang, it is perhaps not surprising that Indian courts seem to have become familiar with the notion of unilateral contracts supported by executed consideration, and to have shown a readiness to realise its full implications, at a date earlier than some of their common law brethren. The definition in clear terms includes this aspect of consideration. To have such a definition before them might have assisted the House of Lords in *Maddison* v. *Alderson*. There Stephen J. himself in the lower court had found a contract in a promise by a deceased person to devise a farm to his housekeeper, if she served him without wages for the rest of his days,[39] while the House of Lords refused to accept this proposition.[40] There is, however, no such hesitation in a Calcutta case of a similar period: *Kedar Nath Bhattacharji* v. *Gorie*

[38] (1913) 11 All.L.J. 489, 492, citing Pollock, *op. cit.*, 8th ed., 15, 22. and Ashley on *Contracts*, 16, 23–24. Other parts of the Commonwealth followed this example: the Court of Appeal of South Africa two years later in *Bloom* v. *American Swiss Watch Co.* (1915) App.D. 100, and subsequently the High Court of Australia: *R.* v. *Clarke* (1927) 40 C.L.R. 227.

[39] (1880) 5 Ex.D. 293, 306, *sub nom. Alderson* v. *Maddison.*

[40] (1883) 8 App.Cas. 467. The case was actually decided on the ground that there was no memorandum or part performance to satisfy the Statute of Frauds. (It may be noted that on the recommendation of the Commissioners, p. 7 of their report, the Statute of Frauds, in so far as it applied in India, was abrogated by the 1872 Act, and "ceased from troubling honest men": Pollock, *Law of Fraud in British India*, 127.) Some of their Lordships' remarks may be explained as a mere finding that there was insufficient evidence of a unilateral contract, and not as a failure to appreciate the existence of such a category of contracts, but Lord Blackburn's remark that it was *impossible* to say the jury had found a contract (p. 487) is very strong. Lord O'Hagan (484) may be referring to the absence of cogent evidence, but Lord Selborne (472) is clearly unfamiliar with the type of consideration in question: he stresses that the housekeeper was not bound to go on serving, and seems to think he has thereby made a point against her, when in fact it is typical of unilateral contracts that the promisee is not bound to complete the act.

(1886).[41] There persons were asked to subscribe to build a Town Hall for Howrah. G. agreed to subscribe Rs. 100/-, but later refused to pay. In holding that there was consideration, Petheram C.J. said: "The subscriber by subscribing says in effect:—in consideration of your agreeing to enter into a contract to erect or yourselves erecting this building, I undertake to supply the money for it up to the amount for which I subscribe my name."[42] In England, the Chancery courts at any rate were not far behind. In *Re Soames* (1897),[43] S. promised to leave the plaintiffs £3,000 by his will for the maintenance of a school. The plaintiffs established a school, which the court held they would not have done, but for S.'s influence. The will of S. contained no such bequest, but his executors were held liable. In *Re Mountgarret* (1913),[44] M. suggested that estimates be obtained for the cost of supplying seating in a school chapel. The school governors obtained designs, though no funds were available, and sent them to M. He replied that the school could look to him for £2,800, and also stated that he was willing for lectern, pulpit and organ work to be added if the cost was not above £3,000. The seating was installed, and plans for the additional work prepared, but then M. died. His estate was held liable for the seating, and the plans for the other work, but not the actual work. These two decisions of Chancery judges are mentioned in Cheshire and Fifoot as cases where courts of equity, to assist a charity, have been astute to infer mutual promises,[45] but this is to misunderstand the force of the decisions which have nothing to do with mutual promises and executory consideration: they are cases of executed consideration, that is where there is a promise for an act. A makes a promise to B if B performs an act. B is at liberty to act or not, but if he does so, A is liable on his promise, B's act providing the necessary consideration. The Howrah Town Hall case has been approved in India, in defiance of the criticism of Pollock,[46] and it is submitted that in principle it is sound. One question still unsettled in both countries is whether in such a case the promisor can effectively revoke his promise once the promisee has started to perform the desired act. It has been seen that in *Re Mountgarret* (*supra*) liability was restricted to work actually completed before the revocation of the promise by death, but more recent dicta in England and India favour the view that

[41] 14 Cal. 64 (bench).
[42] It is not clear from the report that work had begun on the town hall, but some such act is a prerequisite of liability of the promisor.
[43] 13 T.L.R. 430.
[44] 29 T.L.R. 325.
[45] *Op. cit.*, 3rd ed. (1952), 83, n. 4. (There is no reference whatever to the two cases in the 4th ed.)
[46] *Perumal Mudaliar* v. *Sendanatha Mudaliar*, A.I.R. 1918 Mad. 311 (bench).

the promise becomes irrevocable as soon as any definite steps have been taken by the promisee on the faith of the promise.[47]

In the definition of consideration set out above, it is noteworthy that the English rule that consideration must move from the promisee has been discarded—" when the promisee or *any other person* has done . . . something, such act . . . is called a consideration." There are two obstacles to suits by a third party beneficiary in English law, first the rule that has been abrogated in India, and secondly the rule still in force that only a party to a contract can sue upon it.[48] This second obstacle is regarded by Cheshire and Fifoot as the main one.[49] It is interesting to examine the results achieved in India as a result of the removal of one set of fetters. In some cases there is no difficulty of enforcement, as the agreement is a tripartite one. In *Chinnaya* v. *Ramayya*, L., who had formerly paid an annuity to her brothers, granted an estate to C., and directed her to pay the annuity in future. By an agreement of even date, C. promised L.'s brothers to carry out L.'s directions. It was held without difficulty that L.'s brothers could sue C.[50] It has also sometimes been found possible to give a remedy by holding that the person, who actually entered into the contract, was acting as agent for the " third party," who thus becomes a principal in the transaction. In the English case of *Dunlop* v. *Selfridge*, some attention was given to this possibility, though the plaintiff inevitably failed both in the Court of Appeal and in the House of Lords, since no consideration moved from him to the defendant. There D., a tyre manufacturer, sold tyres to a wholesaler Dew, who agreed not to resell below the list price fixed by D., and as agent of D. to obtain a similar undertaking from any buyer from him. Dew resold to S., a retailer, taking from him the stipulated agreement, but S. sold to a customer below the list price. D. sued S., but his action failed as no consideration moved from him to S. S. also pleaded that D. was not a party to the contract. On this point, Lord Dunedin expressly held that D. was an undisclosed principal.[51] Most of the other judges were against D. also on this point, because of the rule in *Humble* v. *Hunter*[52] that an

[47] *Errington* v. *E.* [1952] 1 K.B. 290, 295, *per* Denning L.J.; *District Board, Ramnad* v. *Mohd. Ibrahim*, A.I.R. 1933 Mad. 524 (bench). See also American Restatement, para. 45.

[48] The better view is that this rule still prevails: *Krishna Lal Sadhu* v. *Pramila Bala Dasi* (1928) 55 Cal. 1315, 1326, *per* Rankin C.J.: *Veeramma* v. *Appayya*, A.I.R. 1957 A.P. 965; *Babu Ram* v. *Dhan Singh*, A.I.R. 1957 Punj. 169 (bench). See also Pollock and Mulla, *op. cit.*, 8th ed., 20–21.

[49] *Op. cit.*, p. 365.

[50] (1881) 4 Mad. 137 (bench). A similar case is *Samuel* v. *Ananthanatha* (1883) 6 Mad. 351 (bench).

[51] [1915] A.C. 847, 855.

[52] (1848) 12 Q.B. 310. I know of no authority applying this rule in India.

undisclosed principal cannot sue if the terms of the contract are such as to import that the person apparently contracting is the real and only principal.[53] Another point that some judges regarded as fatal to D.'s claim was that the agreement was to be performed in part by Dew, the alleged agent, and doubted whether it was possible to have a contract in part between Dew and S., and in part between D. and S. for the respective purposes of Dew and D. independently.[54] There are Indian cases where this latter difficulty has not been felt, though the purposes of the alleged principal and agent, far from being independent, were almost identical. In *Daropti* v. *Jaspat Rai*,[55] D.'s son and S.'s daughter P. were already married, but P. had left D.'s house, where she had lived with her husband, because of D.'s cruelty. D. then executed an agreement with S., promising to treat P. properly, or if he failed to do so, to pay her monthly maintenance, and provide her with a house to live in. Subsequently P. was again ill treated by D. and his wife, and driven from the marital home. In upholding a claim by P. against D. for maintenance, the court held that S. had contracted as agent for P. Although P. was of age, she would not appear in public, and was very properly represented by her father. Consideration was provided both by P. in offering to resume living in D.'s house despite former cruelty, and also by S., in relinquishing a house to D. purchased by S. and regarding which D. claimed rights of pre-emption. One outcome of the court's analysis would be that P., who is held to be a principal, could be liable under the agreement, had she committed any breach of it.[56] This was one of the matters that weighed with the court of Queen's Bench in *Tweddle* v. *Atkinson*,[57] in deciding to deny any remedy to the son of one of the actual contracting parents. Further difficulties are encountered where the so-called principal is a minor, but escaped the attention of the court in *Muhammad Omar* v. *Budha*,[58] where *Daropti's* case was applied in enforcing a suit by a minor male to recover damages for breach of a betrothal contract made by his father. Lal Chand J. said that the real parties were the children not the parents, but in that situation the whole agreement is void for want of capacity, and in India the rule of invalidity of minor's agreements is applied

[53] Lords Atkinson, Sumner and Parmoor.

[54] Lord Haldane, and in the C.A. Kennedy L.J.: (1914) 83 L.J.K.B. 923, 930. *Contra* Lord Sumner.

[55] (1905) P.R. No. 49, p. 171 (Punjab Chief Court). Approved in *Fernandes* v. *Gonsalves* (1924) 48 Bom. 673, 687, *per* Taraporewala J. of the Bombay High Court.

[56] It may be noted that in India married women are under no contractual disability: Commissioners' Report, p. 7.

[57] (1861) 1 B. & S. 393, 396.

[58] (1909) P.R. No. 3, p. 5.

more rigidly than in England.[59] It is true that in such a case the agent may be held personally liable, as the principal cannot be sued,[59a] but the minor principal is divorced from suing, and if his parent and agent sues, his damages will be measured by the damage suffered by the parent, and loss to the child will be an irrelevant matter.[60] It is perhaps the appreciation of some such difficulties, inherent in an appeal to the rules of principal and agent, that has led Indian courts and pleaders to rely, as in England, on the trust concept to give a remedy to the third party *cestui que trust*. Certainly the principal and agent aspect of the matter seems to be confined to the two little known Punjab cases already mentioned, whereas the case of *Khwaja Muhammad Khan* v. *Husaini Begum* [61] was fought up to the Privy Council on the trust concept. In that case there was an agreement between the father of P., a minor girl, and D., the father of her intended husband, in consideration of marriage. P. sued D. with success for arrears of betel nut money, payable under the agreement, on the basis that her father had contracted as a trustee for her. In general the cases on the appeal to the trust concept are in as unsatisfactory a condition as in England, and the result of a particular case is hard to predict. There are, however, certain types of case where such an appeal can be confidently expected to gain the day.[62]

The rule in *Pinnel's Case* [63] that the payment of a lesser sum cannot be a satisfaction of the whole, does not operate in India. It is plainly excluded by section 63. In 1872 it had not yet received the blessing of the House of Lords in *Foakes* v. *Beer*.[64] Certainly the Commissioners felt no compunction in recommending its abolition.[65]

[59] See nn. 72, 77 (*infra*).

[59a] s. 230 (3) of the Act— in *Chatturbhuj* v. *Moreshwar*, A.I.R. 1954 S.C. 236, 243, the Supreme Court held that this subsection applied, although the principal, the Government, was not liable, for failure to comply with Art. 299 (1) of the Constitution, prescribing formalities for contracts with the Government. In England an agent of full age is liable personally if the infant principal is not liable: *Queensland Investment* v. *O'Connell & Palmer* (1896) 12 T.L.R. 502.

[60] See *Raj Rani* v. *Prem Adib*, A.I.R. 1949 Bom. 215, 219 (discussed *infra* n. 77) *per* Desai J.—even had the father of the film star sued, he could have recovered only the damages he (the father) had suffered. See also *Khimji Kuverji* v. *Lalji Karamsey* (1941) Bom. 211, 215, *per* Beaumont C.J.—if the father of a prospective bridegroom sues the bride's father for breach of a marriage agreement, he will recover only his personal damages.

[61] (1910) 37 I.A. 152.

[62] See Pollock and Mulla, *op. cit.*, 22, n. (*i*). For a passionate plea for the extensive use of the trust concept to permit widespread suits by third party beneficiaries, see Lort-Williams J. in *Kshirodebihari* v. *Mangobinda Panda* (1933) 61 Cal. 841, but this view is not generally accepted, see *inter alia* the cases cited in n. 48 (*supra*).

[63] (1602) 5 Co.Rep. 117a.

[64] (1884) 9 App.Cas. 605.

[65] Report, p. 8.

It has never been held in India that a contract under seal of itself imported that there was sufficient consideration,[66] and the Commissioners did not favour the introduction of any such rule.[67] They did, however, propose that an agreement expressed in writing and registered should not require consideration.[68] This proposal was ultimately watered down by the addition of a requirement of natural love and affection between parties standing in a near relation, before consideration can be dispensed with: section 25 (1).

Section 25 (2) contains an important exception to the rule that consideration is necessary. The exception is in the case of "a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do." This exception considerably extends the common law rule of *Lampleigh* v. *Brathwait* [69] in that under section 25 (2) there need be no previous request for the service.

Infants

At the outset it may be mentioned that one of Indian domicile attains majority at the age of eighteen: section 3, Indian Majority Act, 1875.

The law of India on this topic is in an unsatisfactory condition, and the principles are far from clear. Many of the difficulties are quite different from those that bedevil this branch of English law, but the fountain head of the trouble is in each system an ill-drafted statutory provision. The Contract Act came into force two years before the passing of the Infants' Relief Act, 1874.[70] The English law applicable at the time was the common law rule that an infant's agreements were in general voidable at his option, except that he was bound where necessaries were concerned. The Act adopted the exception in section 68, which has been interpreted as closely following the English law, and settles one point doubtful there by a clear provision that the liability is quasi-contractual.[71] Section 11, the general section on the topic, is, however, far from precise, in fact it approaches the question from the standpoint of capacity, not incapacity—

> "Every person is competent to contract who is of the age of majority according to the law to which he is subject, and

[66] *Kaliprasad Tewari* v. *Raja Sabib Prahlad Sen* (1869) 12 Moo.App. at p. 314 (P.C.).
[67] Report, p. 7.
[68] *Ibid.* See also draft s. 10, exception 1.
[69] (1615) Hob. 105.
[70] 37 & 38 Vict. c. 62.
[71] S. 68 is the first section in Chapter V, which is headed: "Of certain relations resembling those created by contract."

who is of sound mind, and is not disqualified from contracting by any law to which he is subject."

For some time the current of Indian decisions was that a minor's agreement was voidable at his option, but in 1903 the Privy Council held in *Mohori Bibee* v. *Dhurmodas*[72] that a minor's agreement was void. The actual decision in the case was an obvious one: the minor had executed a mortgage in favour of one who knew him to be a minor.[73] Perhaps their Lordships did not appreciate the unfortunate results that would flow from the rigid and uncompromising ruling. It remains to consider what exceptions the courts have managed to engraft upon the general rule. In England, agreements of apprenticeship and service are binding if for the benefit of the minor, but in India the exception applies only to apprenticeship, which is governed by a special statute.[74] As in England, agreements to render personal service even by a major cannot be enforced specifically.[75]

According to the common law, a minor can at his election enforce an agreement against an adult.[76] Indian law knows no such rule. Thus arises the situation, surprising to an English lawyer, of an infant film star denied any remedy for breach by a film company of an agreement clearly for the infant's benefit.[77] The infant was engaged on a one-year contract to complete a film, but after a month the defendant terminated the agreement. The infant sued in vain for damages, and it was also held that she could not recover for the month that she did work, as the executed contract exception, shortly to be discussed,[78] was not applicable. This is an anomalous position that an infant who has actually performed some work for another has no legal right to an anna's remuneration. The only inroads made by the Indian courts on a Privy Council decision, that has denied access to the courts to minors seeking to enforce agreements, have been in the sphere of breach of promise of marriage and of executed contracts.

Before examining the attitude of Indian courts to breach of promise of marriage, the English law, where one or more infants are involved, may be stated. In *Cowern* v. *Nield*, Phillimore J. classified agreements to marry with contracts of apprenticeship,

[72] 30 I.A. 114.
[73] English law is the same on the specific point: *Thurstan* v. *Nottingham P.B.B.S.* (1901) 1 Ch. 1 (C.A.).
[74] The Apprentices Act, Act XIX of 1850.
[75] s. 21 (*b*), Specific Relief Act, 1877.
[76] *Bruce* v. *Warwick* (1815) 6 Taunton 118. For the effect of the Act of 1874. see n. 83 (*infra*).
[77] *Raj Rani* v. *Prem Adib*, A.I.R. 1949 Bom. 215.
[78] *Ibid.* pp. 220, 223. See n. 88 (*infra*).

service, etc., that is as binding if beneficial.[79] It is submitted that this does not give a true picture of the common law. In *Holt* v. *Ward*,[80] Raymond L.C.J. held that an infant might sue a major for breach of promise. In so doing, his Lordship did refer to the point that the contract of marriage was looked upon as an advantageous one, but if the contract of marriage fell within the beneficial class, it would be binding on the infant if for his benefit, and in such a case a major could sue an infant for breach of promise. However in *Hale* v. *Ruthven*[81] Mellor J., after consulting his brethren, held that one infant could not sue another infant for breach of promise, and refused the invitation of the plaintiff's counsel to go into the question of benefit. This view is supported by the fact that in *Coxhead* v. *Mullis*, where the court held that after the Act of 1874, there could be no ratification on attainment of majority of a promise to marry made while an infant, no attempt was made to argue that in any event the promise during infancy was binding, as on the facts the contemplated match was for his benefit.[82] Thus the common law is that a promise of marriage by an infant is not binding upon him, but an infant may sue an adult for breach.[83]

Indian law is not able to allow this one-way traffic, under which in England an infant may break his or her own promise of marriage, but obtain damages for breach of an adult's promise.[84] Indian law enforces the agreement against both parties,[85] subject to the following conditions—

(i) The agreement must be entered into by the minor's guardian on behalf of a minor girl;

(ii) The parties so affianced must belong to a community that recognises the right and duty of parents and guardians to arrange such matches;

(iii) The agreement must be for the benefit of the minor girl;

(iv) The intended husband must be a major.

79 [1912] 2 K.B. 419, 422.

80 (1732) 2 Stra. 937.

81 (1869) 20 L.T. 404.

82 (1878) 3 C.P.D. 439. Surely the absence of any such plea must have been due to counsel's having considered it untenable in law, rather than to his having cynically regarded the proposed match with his fair client as obviously a *mésalliance*.

83 *Semble* this common law rule has survived the 1874 Act, even in the case of the three classes of contract declared " absolutely void " therein, *i.e.*, contracts for the repayment of money lent, for goods supplied or to be supplied, and accounts stated: Cheshire and Fifoot, *op. cit.*, 343; Simpson, *Infants*, 4th ed. (1926), 7, 32–33. *Contra* Chitty, *Contracts* 21st ed. (1955) 602, in the case of the three specified classes. The point has recently been discussed at length. Treitel supporting Chitty in (1957) 73 L.Q.R. 194, 201–202, (1958) 74 L.Q.R. 104–105; Atiyah *contra* in (1958) 74 L.Q.R. 97, 99–101.

84 *Fernandes* v. *Gonsalves* (1924) 48 Bom. 673, 678.

85 *Ibid.*; *Khimji Kuverji* v. *Lalji Karamsey* (1941) Bom. 211 (bench).

The justification for such decisions must be that the contrary text is not statutory: there is nothing in the Act to prevent the same construction as is placed on the Infants' Relief Act in England.[86] Even the Privy Council might have been less sweeping in their formulation of the principle of nullity had their Lordships been dealing with an agreement to marry.[87] It is certainly to be hoped that further glosses will be made on this far-reaching decision of the Privy Council. Perhaps one day the new Supreme Court may modify it.

Another gloss on *Mohori Bibee's* case is in the matter of agreements completely executed on the minor's side, so that there can be no further liabilities on his part for the very good reason that nothing remains to be done by him. Therefore if the court recognises the validity of the transaction, its decision can operate only to confer rights on the minor and not liabilities. In fact this exception goes back to the days before the Privy Council decision, but has been allowed to survive. Thus a minor can sue on a bond or promissory note in his own favour, and can enforce a mortgage where he has advanced the whole of the mortgage money, or a sale deed, where he has paid the price.[88] It has, however, been held that a lease in favour of a minor is void, as it imposes obligations upon him to pay rent and to perform covenants.[89] English law has the happier solution in the case of sales, leases and mortgages to a minor, that he may repudiate the transaction on attaining majority, but otherwise is bound.[90] This gloss on the Privy Council case forms the only legal basis for a minor to recover wages for work done, and even here there are limitations, as the film star case shows (*supra*).[91] Presumably the minor can sue only on the termination of the employment, and if the employer wrongfully terminates the engagement prematurely there may be circumstances, as in the film star case, precluding recovery *pro tanto* for services actually rendered. The exception seems a difficult one to operate. How can one be sure that there can be no further liabilities on the infant's side? In *Abdul Ghaffar* v. *Piare Lal*,[92]

[86] *Raghava Chariar* v. *Srinivasa* (1916) 40 Mad. 308, 327, *per* Srinivasa Ayyangar J.

[87] (1924) 48 Bom. 673, 676 (*supra*), *per* Taraporewala J.: "Whether their Lordships would have applied the same principle to a contract of marriage is to my mind very doubtful."

[88] Bond—*Hanmant Lakhshman* v. *Jayarao Narsinha* (1888) 13 Bom. 50 (bench); promissory note—*Madhab Koeri* v. *Baikuntha*, A.I.R. 1919 Pat. 561 (bench); mortgage—*Raghava Chariar* v. *Srinivasa* (*supra*) (full bench); sale—*Narain Das* v. *Mst. Dhania* (1915) 37 All. 154 (bench).

[89] *Pramala Basi Das* v. *Jogeshar Mandal* (1918) 3 Pat.L.J. 518.

[90] *N.W. Ry.* v. *McMichael* (1850) 5 Ex. 114, 119.

[91] n. 78 (*supra*).

[92] (1935) 16 Lah. 1.

Addison J. applied the exception to a case where the minor plaintiff had supplied ivory goods to the defendant, and sued for the price, but under the Indian Sale of Goods Act, which closely follows the English Act of 1893, there are many conditions and warranties implied on the sale of a chattel. How is the court to satisfy itself that there will never subsequently be a valid claim for breach by the infant of some warranty? The strangest case of all is *Great American Insurance* v. *Madanlal*.[93] P. was the minor owner of some cotton, which his guardian insured against fire with D. Later fire destroyed the cotton, and D. repudiated liability, pleading P.'s infancy. The court, holding D. liable, referred to the executed contract principle but did not apply it, and they also denied that they were following the principle of the marriage cases. They merely said that the guardian was the contracting party, and the minor could sue as the premium came from his estate. English law would have a ready answer in such circumstances: the agreement was voidable at the infant's option, but he could and did elect to enforce it. A contract of insurance does not seem to be binding on an infant in English law if for his benefit. It seems that there is a closed category of agreements within this principle, and it is not every contract for the infant's benefit, not falling within prohibited spheres, that is binding upon him. In *Clements* v. *L.N.W.R.*,[94] the Court of Appeal was invited to hold that a contract of insurance, if for the benefit of an infant, is binding upon him, but the court held the infant bound only on the ground that the provision as to insurance was merely one of the terms in a contract of *service* of a beneficial character, and Kay L.J. expressed his doubts whether there was any general principle that an agreement for the benefit of an infant binds him.[95]

A question that has recently been before the courts in both countries is whether the guarantor of an infant's void debt can be liable on his guarantee. In *Coutts* v. *Browne-Lecky*,[96] Oliver J. held the guarantor of an infant's overdraft with a bank not liable, and his decision has been followed in *E. K. K. Nambiar* v. *M. K. Raman* (1957).[97] It has, however, not escaped academic criticism,[98] and older authority in both countries tends the other way. In two English cases a guarantor was held liable. In *Harris* v. *Huntbach*, where a grandfather was held liable on a guarantee of his grandson's debt, Foster J. said: "The infant was not liable, and therefore it could not be a collateral undertaking. It was an original undertaking of the defendant to pay the money."[99]

[93] (1935) 59 Bom. 656 (bench).
[94] [1894] 2 Q.B. 482.
[95] *Ibid.* at p. 493.
[96] [1947] 1 K.B. 104.
[97] A.I.R. 1957 Mad. 164 (bench).
[98] By E. J. Cohn in (1947) 10 Mod.L.R. 40.
[99] (1757) 1 Burr. 373, 376.

In *Wauthier* v. *Wilson*, a father had guaranteed his son's debt, and was held liable by Pickford J. as on a guarantee, though in the Court of Appeal on the footing of indemnity.[1] It is significant that in both cases the guarantor must have known of the minority of the principal debtor in view of the close relationship. There was also knowledge in the *Coutts* case, and it is submitted the decision was wrong. Oliver J. did consider whether the contract was not one of indemnity, in which case the guarantor was inevitably liable, but he studied only the actual phrasing of the contract, and paid no regard to inferences to be drawn from the circumstances. Surely if the guarantor knows of the absence of liability of the principal debtor at the time he agrees to stand surety, he cannot be heard to say that he was merely beating the air: he should be precluded from denying that the contract was one of indemnity whatever the precise form of words in which the contract is couched. In India, *Harris* v. *Huntbach* was followed in *Kashiba* v. *Shripat*.[2] Again the guarantor was the father of the principal debtor. In the 1957 Madras case, reliance was placed on the *Coutts* decision, and also on section 128 of the Act, which states that the liability of the surety is co-extensive with that of the principal debtor. Indian law has, however, adopted the English distinction between contracts of indemnity (s. 124) and contracts of guarantee (s. 126), and it is submitted that where the surety knows of the minority of the principal debtor, the inevitable inference is that the contract was one of indemnity. In the Madras case, it is not mentioned whether the surety knew of the incapacity of the principal debtor, as the question of knowledge was not regarded as material. The decision of the question in the absence of such knowledge is not so obvious. Cohn argues for liability of the guarantor in this case also, but he does cite continental codes which make the liability depend upon knowledge.[3] At any rate for India, the latter would seem the better rule, partly because of section 128,[4] and also because the agreement of an infant is totally void in a wider range of cases than in England, as has been seen. Furthermore no English decision goes as far as to impose liability in the absence of knowledge.

(To be continued.)

1 (1911) 27 T.L.R. 582 (Pickford J.); (1913) 29 T.L.R. 239 (C.A.).
2 (1894) 19 Bom. 697.
3 At p. 46—the Swiss Code of Obligations, Art. 494 (3); the Franco-Italian draft Code of Obligations, Art. 710 (2).
4 It is perhaps significant that in an article on the *Coutts* case in (1947) 63 L.Q.R. 355, R. Else Mitchell treats the whole question to be decided as whether the surety's liability is co-extensive with that of the principal debtor (356). Where, as in India, there is a specific statutory provision expressly answering that question in the affirmative, this will not easily be circumvented, except as indicated above by treating the security as one of indemnity in appropriate cases.

MISTAKE OF LAW IN USUCAPION

[G. 2.50, J. 2.6.5.]

David Daube

A red herring has been drawn over this text. For one and three-quarter millennia no particular difficulty was felt about usucapion where the usufructuary of a female slave sells the offspring in the belief that it belongs to him—a belief which is false since the child of an *ancilla* is not treated as fruit. Some thirty years ago, however, Siber declared [1] that usucapion is impossible because of *error juris*. Several passages explain that *bona fides* resting on *error juris* is not good enough for usucapion, and in this case—Siber holds—the buyer is wrong about the rules governing the offspring of a slave woman in usufruct. In Siber's opinion, Gaius intends only to point out that the offspring is not *res furtiva*, but he does not admit usucapion.

Recently, Kaser [2] has proceeded from Siber's premise—that this is an example of *bona fides* in usucapion being the result of *error juris*. But, contrary to Siber, he thinks that Gaius does admit usucapion. So the conclusion he draws is to regard this text as evidence that the passages denying usucapion where the buyer is in *error juris* are interpolated. The fact that Justinian copies the text in his *Institutes* though it clashes with the interpolated law is presumably considered unimportant: he was so careless.

But the whole problem is imaginary. For Gaius's admission of usucapion—which should not be disputed—is not in conflict at all with the passages refusing to recognise for usucapion such *bona fides* as takes the form of *error juris*. Neither, for that matter, does it support them. It has nothing to do with them. His case simply does not show the complicating feature with which they are concerned: there is no mistake of law on the part of the buyer.

That Gaius admits usucapion is beyond doubt. He starts from the rule that *res furtivae* are incapable of usucapion; as sale of somebody else's movable usually presupposes theft at some stage, this rule means that usucapion of a movable is not common. There are, however, he goes on, cases where no theft is involved. The first he gives is of an heir who sells an object which was lent to

[1] *Römisches Recht*, Vol. 2, 1928, 91, n. 32.
[2] *Das Römische Privatrecht*, Vol. 1, 1955, 357, n. 33.

the deceased and which he thinks is part of the estate. No furtivity and, obviously, the buyer will usucape. Then comes the case under discussion, of a usufructuary who sells the offspring of the slave woman, thinking that it is his. Again, no theft, and surely, again, usucapion. The case is joined onto the first by means of *item*, "similarly": the reader cannot possibly be meant to draw a distinction and, while assuming absence of furtivity and scope for usucapion in the first, to ratiocinate: yes, absence of furtivity also in the second, yet, owing to the intervention of *error juris*, no scope for usucapion. Moreover, there would be no point in the illustration unless it showed that, though usucapion of a movable is rare, it can occur; this after all is the theme of the paragraph.

Anyhow, the matter is explicitly settled by Gaius himself. Immediately after the second case, of the usufructuary, he continues: *aliis quoque modis accidere potest ut . . . a possessore usucapiatur*, "in other ways also it may happen that the object is usucaped." This formulation, in particular the *quoque*, "also," renders it clear that in the preceding cases—certainly in that of the usufructuary, coming just before—usucapion does take place.

This conclusion is fully confirmed by D. 41.3.36, from Gaius's *Res Cottidianae*. Here the theme is stated in unambiguous terms at the outset: there are quite a few ways in which a man may come to consider somebody else's object his own and sell it, *et ob id a bonae fidei possessore res usucapi possit*, "and the object therefore become open to usucapion by the possessor in good faith." Among the illustrations that follow is the case of the usufructuary.

Gaius, then, allows usucapion. Nor is he in disagreement with those passages insisting on something better for usucapion than *bona fides* in consequence of *error juris*. They all, needless to say, deal with *bona fides*, not of the transferor, but of the transferee. The kind of case they envisage is that I buy your house from your wife, in the belief that a wife is entitled to dispose of her husband's property. Though *bona fide*, I cannot, according to those passages, usucape since my *bona fides* is based on *error juris*. In one text quoted by Siber, incidentally, where an owner in *error juris* omits to claim his property from the possessor, usucapion fails for lack of *justa causa*, and *bona fides* does not come in at all. But if it did, it would, of course, refer to the possessor's state of mind (as Siber indeed thinks it does): where it is a question of inadequacy of the *bona fides*, of *bona fides* owing to *error juris*, the *error juris* is necessarily on the part of the transferee. In the case of the usufructuary, however, it is the transferor, the usufructuary, who commits *error juris*—very different.

Gaius speaks of a usufructuary who sells the woman's offspring

in the belief that it is his, *partum etiam suum esse credens vendiderit aut donaverit*: a mistake of law on his part. For Siber and Kaser, the buyer must be labouring under the same error. But this is an unwarranted deduction. Siber actually represents Gaius as "introducing the example of a slave woman's child whom somebody buys from the usufructuary in the belief that it is fruit and therefore belongs to the usufructuary." A fatal switch of persons. Very likely the buyer knows nothing about the usufruct at all. The vendor told him that he had a fine, young slave whom he was ready to sell, and he agreed to take him. No *error juris* here. We may safely assume that it is this normal situation which Gaius has in mind. The transferee's attitude creates no problem whatever. He is buying from a person whom, in an error of fact, he believes to be the owner—the standard example of *bona fides* in usucapion.

To avoid misunderstandings, a further remark about the one-sidedness of the requirement of *bona fides* may be made. When we say that this requirement has regard to the transferee alone, we are aware that, in the case of a movable, in a sense the transferor too must be *bona fide*; otherwise the object will become *res furtiva*. But, technically, this comes, not under the requirement of *bona fides*, but under the provision by which *res furtivae* are incapable of usucapion. The rules, therefore, as to what is sufficient *bona fides* in the transferee and what excludes theft on the part of the transferor must not be expected to be identical. It would be wrong to argue that, because *bona fides* coming about in a certain way —through *error juris*—will not avail the transferee, the same state of mind—an honest misreading of the law—must make the transferor into a thief. It does not. It should be remembered that, in the case of land, even plain *mala fides* in the transferor does not stand in the way of usucapion: land cannot be *res furtiva*, and *bona fides* is required only of the transferee.

If the usufructuary of a female slave sells the offspring in the belief that it is his, he is making a mistake as to the rules about children of *ancillae*; they belong to the owner, not the usufructuary. He is evidently free, however, of any criminal *animus*, no theft is committed, and the object does not become *res furtiva*. Any stricter requirements regarding the state of mind of the transferee are inapplicable to the transferor.

The transferee, the buyer, shows the typical, ordinary *bona fides*. As far as this text is concerned, the passages denying usucapion where *bona fides* is due to *error juris* may be genuine or spurious. They are irrelevant. In the case before us, the transferor is in *error juris*—enough to exclude theft, but without damaging

effect, say, on *justa causa*: the sale is in order. The transferee is in no such error, he simply thinks the transferor to be the owner—sound *bona fides*. Whatever those passages may say, there is no reason why usucapion should not proceed. Pernice, who is cited by Siber, was perfectly aware that those passages have nothing to do with this case.[3] He rightly classes them under the heading of *error juris* in usucapion, while classing the present case under *error juris* outside the field of usucapion. The *error juris* in this text, the usufructuary's misconception, is judged from the point of view of the doctrine of theft—has he been guilty of *furtum*?—not from the point of view of any provisions peculiar to usucapion—does the party who is to usucape fulfil the necessary psychological conditions? There is no problem here as to the latter point.

Let us note that, even if the transferee had interested himself in the exact way in which the vendor became owner and, having been informed, shared the notion that a usufructuary acquires the child of an *ancilla*, it is doubtful whether usucapion would be impeded. It is difficult to imagine how—except in very special circumstances—the point could be effectively brought up. Once it is established that he looked on the vendor as owner, he will hardly have to sit an examination in modes of acquisition. Furthermore, if it did come out, the judge might still find the error too remote to be relevant, he might still be satisfied with the buyer's belief in the vendor's ownership. We must not forget that in the matter of *bona fides*, the court inclined to presume in favour of the transferee.

Usucapion would probably fail where the buyer does not regard the vendor as owner at all but thinks that a usufructuary has the right to alienate. But we need not go into such subtleties, of which there is no trace in Gaius. His buyer should not be credited with any particularly interesting reflections: he is taking a young slave from a vendor who appears to own him.

Siber adduces three texts. In D. 41.4.2.15, from Paul, I buy from a ward without his tutor's authority. If I believe the ward to be of age, I may usucape; if I know that he is a ward but believe that a ward can dispose of his property, I may not usucape. In both cases I am *bona fide*, but in the second my *bona fides* springs from *error juris*. This, however, is no parallel to the case where I buy a slave child from the man I think owner, an error of fact, though he—the usufructuary of the mother, the transferor—thinks himself owner under the influence of an *error juris*.

The text has been attacked, with insufficient reason. In any

[3] *Labeo*, Vol. 2, Part 1, 2nd ed., 1895, 496 *et seq.*

case, neither the arguments for nor those against interpolation are directly connected with the question of this article.

D. 41.3.31pr., from Pomponius,[4] denies usucapion where I buy from a ward whose tutor's authority, though given, is not given at the proper time: he approves when negotiations are only starting or ratifies long after their close. I am *bona fide*, but my *bona fides* rests on the erroneous assumption that such prior or subsequent consent is valid. Hence no usucapion—but again, this is not the same as where I buy from a person whom I think owner and who himself, from an *error juris*, thinks he is, though in fact he is not. The text appears to have suffered some interference, but not of a kind that affects our argument.

Buckland's treatment of these two cases, incidentally, is not quite satisfactory. He says that "where there was an error of law, the transaction was often void, and usucapion excluded for lack of *justa causa*, *e.g.*, where one bought from a *pupillus* thinking that *auctoritas* was not necessary, or could be by ratification. Here, the transaction being void, there was only a putative *causa*, which fact barred *usucapio*."[5]

But it is questionable whether sale by a *pupillus* was so absolutely void as to constitute no *justa causa* for usucapion. Had it been, usucapion would have been impossible even where one bought from him in error of fact, thinking him to be of age. But unless there are fundamental interpolations—which Buckland does not postulate—usucapion here was admitted. Nor was it admitted only *utilitatis causa*, as in the case of unwitting purchase from a *furiosus*.[6] Sale by a *pupillus* did have some limited force in other respects. The better analysis seems to be that, where I buy from a *pupillus* deeming the tutor's co-operation superfluous, or valid even if obtained at the wrong time, usucapion fails not for lack of *justa causa*, but because my *bona fides* consists in an *error juris*. It may be added, however, that the question has no bearing on our main thesis. Evidently, where I buy a slave child from a man I believe owner though in reality he only had a usufruct over the mother, no flaw attaches to the sale as such, the *justa causa*.

Of course, the Roman jurists themselves do not always keep the *bona fides* aspect and the *justa causa* aspect of usucapion in separate compartments; there is much overlapping. But a measure of distinction is made by them and must be respected by us. It is flagrantly disregarded by Siber when he adduces Vat.Fr. 296,

[4] Siber accepts the inscription in the *Digest*, which says Paul. But see Lenel, *Palingenesia Juris Civilis*, 1889, Vol. 2, 140.
[5] *Text-Book of Roman Law*, 2nd ed., 1932, 244.
[6] D.41.4.2.16, cited by Buckland, *loc. cit.*, n. 3.

from Papinian, as his third text. This decision—which, as may be gathered from Vat.Fr. 294, also Papinian, and D. 41.5.2.2, Julian, goes back to Servius Sulpicius—has nothing to do with adequacy or inadequacy of *bona fides* produced by *error juris*. The error is mentioned to show that no *justa causa* is present.

A man makes a gift of land to one of his sons in his *potestas*. The land remains the father's property. The father dies and the inheritance is divided between the donee and his brother. But the latter, instead of taking his half of the land,[7] mistakenly leaves it with the donee. The donee, we learn, will not usucape the half which is his brother's.

The reason, however, is not any flaw in his *bona fides*—*bona fides* involving *error juris*—but simply the entire absence of a *justa causa*. In fact, two other texts expressly say so; one from the same jurist, Papinian, namely, Vat.Fr. 294.1, *quod neque frater ipse donaverat neque pater donare poterat*, "because neither did the brother himself make a gift nor was the father even able to make one," the other from Paul, D. 41.6.1.1., *quoniam nulla donatio fuit*, "because there has been no gift by either father or brother." Usucapion is excluded because the father's gift to a son in *potestas* was a nullity, and the brother's inadvertent omission to lay claim to his share does not amount to a gift: there is no *justa causa*.

The fact that the brother is in error is mentioned because, if he deliberately forwent his claim, if, knowing about his half share, he left the land with the donee, that would be a gift of his half share.[8] As it is, there is just no basis for usucapion. The question of *bona fides* does not arise at all, nor indeed any general consideration of *error juris* on the transferor's part. His error here happens to be relevant, as ruling out a gift.

Siber's misapplication of this text is all the more surprising as, in other connections, he proceeds from the correct analysis.[9] But manifestly, there is all the difference between this case and that where a usufructuary of a slave woman, considering himself owner of the child, sells me the child. His *error juris* does

[7] From some date in the post-classical period, a gift by the *paterfamilias* to one in his *potestas* is confirmed by the former's death; but, as demonstrated by Siber (*Zeitschrift der Savigny-Stiftung* 53, 1933, Rom.Abt., 99 *et seq.*), classical law does not know this rule. Even if one should disagree with Siber, in the cases discussed in Vat.Fr. 296 and parallels, for some reason or other the gift remains void even on the father's death—which is all that matters for our purposes.

[8] D. 41.6.4, where also originally a *res mancipi* must have been concerned, otherwise civil ownership would pass at once: Siber, *Römisches Recht*, Vol. 2, 1928, 88, n. 23.

[9] *Op. cit.* 86, n. 12, *Zeitschrift der Savigny-Stiftung* 53, 1933, Rom. Abt., 101 *et seq.*

not affect the sale, the *justa causa*, in the least, and I am showing the normal *bona fides*, belief in his ownership. The latter fact, by the way, the fact that the buyer from the usufructuary shows the normal *bona fides*, with no *error juris*, would make Vat.Fr. 296 inapplicable even if the donee were prevented from usucapion because of defective *bona fides*. Even if, that is, he were prevented from usucaping, not by lack of *justa causa*, but because his *bona fides* involved an *error juris* as to the validity of his father's gift, this would have no bearing on the case of the usufructuary, where the buyer must not be assumed to have gone into the antecedents of the vendor's title: he simply regards him as owner.

We might perhaps add that it is not even certain that, in the case of the coheirs, Servius Sulpicius was assuming *error juris*, though we have admitted it for the sake of argument. Vat. Fr. 294.1 reads only *error*, without *juris*; this is presumably nearer the original version. Servius may have contemplated the case where the donee's brother neglects his half because he is ignorant of or has forgotten about the gift. He does not know that the land is in the donee's hands, or if he does, how it got there—an error of fact. At least this possibility may have been included by Servius. Vat.Fr. 296 speaks of *error juris*: the donee's brother is aware of the facts but mistakenly infers that, owing to that gift, he has no share in the land. Here also he is making no *donatio* and will not, therefore, lose his half through usucapion. But there is little point in singling out *error juris*. (There is no special reference to it in D. 41.5.2.2 or 41.6.1.1.) So long as he leaves his share with the donee from inadvertence—whether as to law or fact—there is no *donatio*, no *justa causa*, no usucapion.

In conclusion, it may be worth presenting D. 17.1.57, from Papinian, which looks more or less analogous to the case of the usufructuary. A slave-dealer, on going abroad, gives a mandate to sell a number of slaves. The mandatary dies, which ends the mandate. Nonetheless his heir sells the slaves, without any fraudulent intent but, on the contrary, under the misapprehension that the mandate continues. Decision: the buyers will usucape. (When the slave-dealer returns, he may have a praetorian remedy on the ground of absence: but this does not alter the principle.) Such corruption as the text may have suffered is of a minor nature.

Here, as in the case of the usufructuary, the sale, the *justa causa*, is flawless. The transferor is in *error juris* of a kind that saves the object from being *res furtiva*. The transferees no doubt think they are buying from the owner or at least from a duly

authorised agent of his; they are not interested in the exact happenings that have led to their being offered these slaves by the vendor; they are in error as to the facts; their *bona fides* is perfectly sound. This text strongly supports the thesis here advocated: that we may safely abide by the traditional, naive interpretation of G. 2.50, J. 2.6.5.[10]

[10] I should like to thank Professor P. G. Stein, of Aberdeen, for his valuable criticisms.

law, because if a sanction is not an essential element in our idea of duty, then it cannot be an essential element in our idea of law. The failure to recognise this is the chief weakness of Kelsen's doctrine. Chapter 9 on " Rights " is concerned almost entirely with Hohfeld's table of jural relations. It may be doubted whether the subtle analysis to which this table has been here subjected is worth the effort as Hohfeld's important contribution was the clear distinction between right, privilege, power and immunity. The jural correlatives, the jural opposites, and the more recently added jural contradictories have not proved to be particularly helpful in clarifying a doubtful or involved legal problem.

Chapter 10 on " Persons " has added to the confusion which exists in this difficult subject by the use of the word *personality*. On p. 285 the authors speak of the law as endowing human beings with " personality," and of taking " account of personality over a wider field." The usual definition of a legal person as anything, whether human or otherwise, to which the law attributes a capacity for legal rights or duties avoids the complications of personality. On p. 307 the authors say: " It is tempting to say, *e.g.*, that ' a dog is not a person, because it has no rights, etc.' All that the speaker is telling us is that he does not choose to apply the *word* ' person ' to a dog, because, on his definition a ' person ' means something with rights, etc., and a dog has none." With respect, this is semantics run wild if we assume, as we must, that the speaker must be speaking of the dog as a legal person and not as a human person, which would be irrelevant. The speaker cannot therefore arbitrarily " choose " the definition he may wish to give to the concept *person* in this context if his remark is to make any legal sense. The law is not as " chaotic " as the authors suggest (p. 298) as it is not concerned with the nature of personality; in all cases it is a practical question whether the law has ascribed a capacity for rights or duties to a human being, an idea, an animal or an association. It is here that the distinction between the *Taff Vale Ry.* and the *Free Church of Scotland* cases lies, but the authors fail to emphasise this, with the result that the reader may have some difficulty in understanding the distinction between them.

Chapter 11 on " Possession " illustrates the confusion that there is on the subject. The authors are to be congratulated on not attempting to develop any theory of their own when all other theories have broken down, but, on the other hand, they have added to the troubles of the reader by referring to the Rent Acts in considerable detail. There are two insuperable difficulties with which any writer on this subject is faced; the first is one of fact because it is frequently uncertain whether it can be said that a person has physical control of an object or not, *e.g.*, when he is given the key to a room in which a box is stored, and the second is one of law, due to the technical distinctions which have been

introduced, especially in the criminal law, for the purpose of achieving a particular result. It is doubtful whether the *a priori* approach, referred to at p. 334, can really be described as the major villain of the piece.

In Chapter 12 on "Ownership" we are referred again to Dr. Williams' statement that a word can have more than one meaning, which is undoubtedly true. In so far as ownership has any juristic meaning when applied to English law it probably connotes the residuary rights in a thing. The authors attempt an interesting analysis of ownership, but it is doubtful how much this will contribute to juristic thought. These are some of the points to which they draw attention (p. 338): (1) "Ownership in English law can only vest in a 'person'." But this is equally true of all other rights, as a right cannot vest in a non-person, to use that convenient term. (2) "The term 'ownership' is applied to 'things'." This is undoubtedly true if by "things" we cover both corporeal and incorporeal objects. As Pollock has pointed out, a company may own both its buildings and its good-will. The same is true of all other rights, for they also must always have an object. (3) "Ownership is a social institution." (A footnote points out that this idea has been emphasised by Turner.) To prove this truth, which some readers may feel is self-evident, it is said that a man living by himself on a desert island would never need to use the idea of ownership. But, it is equally true to say that he need never use the idea of law at all if he is entirely alone. It must be remembered that law itself is the greatest of all social institutions. (4) "Ownership is the relationship between the owner and other persons." This is equally true of all other legal concepts, for law is always concerned with the relationship between one person and other persons. Finally it is said that "ownership arises only in such ways as are specified by each legal system." It is impossible to see how it could arise in any other way for all rights are specified by the legal system which gives them birth. The analysis of "ownership" in this chapter is therefore of value only in making it clear that "ownership" is not a peculiar institution, and that it does not differ in nature from other rights. This, however, is a point worth making.

In Part III the authors discuss the "Concept of Law" as it has been understood by the jurists from the time of the Greek sophists to the present day. It is obvious that in attempting to cover so vast a field in less than 150 pages it is only possible to give the briefest summaries of the various schools of thought, so that the question arises whether these snippets can be of much value in teaching students to think for themselves. The choice of emphasis seems to be a strange one. Eleven lines are devoted to Aristotle and one page each is given to the Roman Period and to the Medieval Period, no reference being made either to Cicero or to St. Thomas Aquinas. On the other hand, seven pages are

given to Duguit, four and a half pages to Ehrlich, and eleven pages to Marx and Engels. Particular attention is given to sociological jurisprudence, but some of the references to it are of limited interest. At p. 365 we read: "Sociological jurisprudence, says Northrop, has demonstrated that the 'is' of the positive law may become an obstructive impediment if it lags behind the 'is' of the living law, *i.e.*, culture patterns of a society (as to which see the discussion later of Ehrlich)." This time-lag between law and social change has been discussed in simpler language by Dicey in his *Law and Public Opinion in the 19th Century*. In an English book on Jurisprudence more attention might, perhaps, have been paid to the contributions which have been made in this country, from the time of Bracton to the present day, to the concept of law, for in no other country has the idea of law played so important a part in social and political life.

In the last chapter the authors discuss the question *What is Law?*, but they are hesitant in suggesting their own answer to it. This is unfortunate because whenever in this book they have expressed their own views they have proved to be vigorous and interesting. The difficulty has been that in these 500 pages they have undertaken a task which no one could have accomplished, for it is impossible to deal with fundamental legal concepts in so brief a manner without giving the impression of superficiality. Austin, as the authors point out in the preface, created a discipline,—a discipline which is still a force today, even though the conclusion he reached may no longer be accepted,—but he would not have been able to do so if he had been forced to spend almost the whole of his time in analysing and criticising what his predecessors had said. Perhaps the moral is that the time is ripe to scrap the traditional textbook, first made popular by Holland and then standardised by Salmond, and in its place to substitute a "case book" for Jurisprudence in which the student will be able to find adequate extracts from the great writers of the past. The legal philosophers of today will then be able to concentrate on the new approach to which the present book is intended to be a guide.

A. L. Goodhart.

The Law and Legal Theory of the Greeks. By J. Walter Jones, Provost of the Queen's College, Oxford. [London: Clarendon Press: Oxford University Press. 1956. x and 327 pp. 42s. net.]

Students of comparative law and of the general theory of law will be grateful for this long awaited, learned and fascinating sketch of Greek legal ideas, in and about the law, as an aspect of their thought about life in the city. It was unnecessary, we are told,

for the fifth-century Decemvirs of Rome to journey to Athens for information about Greek law, since this was available in the Italian colonies of Greater Greece. Yet inevitably it is from Athens that Mr. Jones draws most of his material, relying, as he must, on historians, dramatists, philosophers and poets rather than on jurists as his sources. Chapter XIV, "The Mental Element in Wrongdoing," is a happy example of the way in which this material is woven together, and includes the story of Orestes, the decay of the blood feud and the development of the judicial trial for homicide. A series of essays rather than a systematic textbook, this modestly sub-titled "Introduction" will be the starting point of all future research on the topics handled.

Some, we are told in the Preface, have denied the name of the law to the rules and institutions devised by the Greeks. Mr. Jones evidently does not agree. On what grounds then does he give the name of law to these rules and institutions? To have offered a simple definition of law and to have asserted the belief that this was exemplified, by and large, in the life of the Greek City, would have given, at once and in a simple way, some crucial information about that social life. Instead, Mr. Jones puzzled at least one reviewer by saying that the rules and institutions of the Greeks "served tolerably well many of the purposes for which the law of our own day exists" (p. v). This suggestion that the so-called law of Greece resembled the law of our own day mainly in as much as it served similar purposes leaves one in doubt both as to Mr. Jones's own concept of law and as to his view of the nature of Greek institutions:—and is confusing as an introduction to the ensuing theoretical chapters on the Function of Law; Dike, Themis, Nomos, and Law and Nature. A clearer picture has emerged by the end of the book. But one is tempted to ask why Mr. Jones is so reluctant to define his basic concepts.

On p. 302 Mr. Jones speaks of "the law as a distinct branch of knowledge concerning the rules laid down or applied by the courts for regulating human conduct." By the time the reader has reached thus far he may wonder whether Mr. Jones might not have accepted something like this initially as a simple definition of law and agreed that it was exemplified, more or less, at least in ancient Athens. But on p. 217 Mr. Jones has said that the Greeks "would not have supposed that a rule was a rule of law only if it had been or would be recognised and applied in a court of law." Does Mr. Jones perhaps feel himself debarred from accepting, as a definition of law in Greece, a definition which the Greeks themselves would have rejected? This, it is suggested, raises a point of some interest for the general theory of law.

The function of a definition of law in legal theory, it is submitted, is to identify and isolate the subject-matter to which the term "law" is to apply—for the scientific purposes of the writer. But the Greeks, so Mr. Jones assures us, "were not interested in

the science of law, but in the art of oratory" (p. 305). They did not therefore construct a definition of law for the purpose of distinguishing a distinctive type of social control. Instead we find what may be termed suasive definitions—descriptions calculated to arouse an attitude, generally (though not always) respectful, towards any subject-matter claiming the name of law; or, alternatively, calculated to cause a denial of binding force to any subject-matter failing to conform to the description. Aristotle's definitions of law as "Reason free from all passion" must clearly be taken, not as a scientific description of a Greek institution, but as a suasive definition, applying rather to an idea or an ideal. It is suggested that it is in such a light that we must consider Plato's similar definition (p. 72), the Stoic view of law as expressed on p. 45, the view of Demosthenes that it is an inherent quality of law to aim at the just (p. 68) and the agreement between Pericles and Alcibiades, recorded by Xenophon, that if obedience is obtained by compulsion there is rule by force and not by law (p. 2). And is not the whole discussion in the Crito (pp. 1, 2), while purporting to investigate the basis of legal obligation, in fact a search for a suasive definition of law? Thus it is possible that the legal theorist, wishing to assert that there was law in ancient Greece, might find it convenient to adopt a concept of law which the Greeks never expressly formulated (though it was exemplified in their society) and which indeed their writers would have rejected as a translation of any of their current terms. And it is possible that by the use of this and other such carefully defined concepts (Mr. Jones makes no use or mention of the concept of "sources of law"!) a clearer picture, even if only by way of contrast with the defined terms, might be given both of Greek institutions and of Greek ideas. Nevertheless a rash reviewer with no Greek must be grateful to Mr. Jones for so often giving the actual Greek word used in the passage he is discussing, and for almost always making it clear by implication what that word is when he uses his stock translations of law for *νόμος* and justice for *δίκη* and *θέμις*. It would seem that *θέμις* and *δίκη* had a more factual and less ideal significance than our "justice," while the reverse might be true of *θέμις* and our "law."

B. E. King.

The Law of Wills, including Intestacy and Administration of Assets. Fifth Edition. By S. J. Bailey, M.A., LL.M., of the Inner Temple, Barrister-at-Law, Fellow of St. John's College, Cambridge; Rouse Ball Professor of English Law in the University of Cambridge. [London: Sir Isaac Pitman & Sons, Ltd. 1957. lii and 306 and (index) 25 pp. 50s. net.]

It is a pleasure to welcome this, the fifth edition of Professor Bailey's book on Wills. In his Preface to the first edition he stated

that his object was to present a description, not only of those aspects of the subject which are usually epitomised by the standard textbooks on the Law of Real Property, but of the general principles of Equity which are of particular importance in the law of wills and of the main principles by which the courts are guided when the construction or interpretation of a will is in issue; it was to be an introductory survey for the use of law students. Everyone agreed that his purposes had been exactly fulfilled. It might have been expected that after five editions spread over twenty-two years, these principles might have been forgotten or overlooked. That is not so. As the law has developed, the author has added more and more material, but it is a tribute to his mastery of the subject that he has been able to incorporate such additions, suggestions and amplifications without losing one iota of the book's great merit. In this edition, apart from noting and incorporating when necessary the recent case law, he has added new material on Intestacy and Family Provision (arising out of the Intestates' Estates Act, 1952), and on the incidence of pecuniary legacies and on alternative gifts. All his additions are marked by that clarity of exposition and directness of approach which has always been a feature of this work. The book remains the only textbook to which one could confidently recommend a student of the subject who was beginning to learn his way in it.

It is, however, alarming to note that for the student these days, the technical apparatus with which he is expected to be familiar is growing alarmingly large. In this introductory survey of 306 pages of text 1,117 cases are cited; the table of cases is 34 pages in length. (In connection with the table of cases, it is useful to notice that, where relevant, references are given both to the *All England Law Reports* and the *Weekly Law Reports*.) Your reviewer must confess that he had hoped to catch the author out, to show that some citations of authority were unnecessary. In fact that is scarcely possible; the references are apt and essential.

The only substantial criticism that can be made about this edition is that it bears all too obvious marks of the fact that a radical resetting of the type is not possible except at great expense. Quite apart from the footnotes, the type now appears in three sizes and sometimes it is difficult to persuade oneself that these differences do not reflect differences in substance. Again the author has resorted to the device of having, not merely footnotes, but also notes in the text (see, for example, pp. 191 and 192). It would not appear that the observations contained in these notes are any more or any less significant than those which precede and follow them. Can they not, therefore, simply be incorporated in the text, or, if fit, put in a footnote? The reader should also note that in addition to a corrigendum which has been inserted at p. 263, there is a further one, almost concealed, one might say, on p. ix referring to p. 138 and p. 127, n. 2.

But these are matters for the publishers. As far as the work itself is concerned, it seems somewhat strange to relegate the Intestates' Estates Act, 1952, Part I, to Appendix A. This important alteration to the claim of a surviving spouse might, surely, be incorporated in the text. Secondly, perhaps on some future occasion an opportunity might be taken to define the difference between a relationship of the whole blood and the half-blood, and perhaps even collateral and step-relationship. These matters are more commonly misunderstood than understood nowadays. On p. 9 is it worth while mentioning that in the case of small estates probate can be obtained through H.M. Officers of Customs and Excise? As far as a case decided in 1943 is concerned, is it still recent (p. 109)? On p. 157 would it not be worth while expanding the explanation of the Contingent Remainders Act, 1877? At p. 171, could not the difficult case of *Re Gaite's Will Trusts* [1949] 1 All E.R. 459 be explained in more detail?

KENNETH SCOTT.

Indian Contract and Specific Relief Acts. By the RT. HON. SIR FREDERIC POLLOCK, Bt., K.C., D.C.L., and the RT. HON. SIR DINSHAH FARDUNJI MULLA, M.A., LL.B. Eighth Edition. By MOTILAL CHIMANLAL SETALVAD, B.A., LL.B., Attorney-General of India, and R. N. GOODERSON, M.A., of the Inner Temple, Barrister-at-Law, Lecturer in Law in the University of Cambridge, Fellow of St. Catherine's College, Cambridge. [Bombay: 1957. N. M. Tripathi Private Ltd. cix and 914 and (index) 56 pp. Rs. 30 net.]

THOUGH Indian courts try fewer cases in contract than an English lawyer might expect, the Contract Act, 1872, purports to lay down the fundamental rules governing transactions out of which a large number of civil actions arise, and it is generally admitted that, as a source of rules applicable to such actions, it is inadequate. Already its short chapters on Sale of Goods and Partnership have been replaced by new statutes; the former by the Sale of Goods Act, 1930, which closely follows the English statute, the latter by the Partnership Act, 1932, which shows signs of independence. Whether the chapters on Bailment and Agency should receive similar treatment may be open to doubt, but if they were eliminated, so as to leave only those dealing with the general principles of contract, it would still be desirable to amend some of the obscurer provisions, such as those dealing with misrepresentation, restraint of trade, and the obligations of a person who has received an advantage under a void contract. On many questions arising in practice the statute gives no guidance; in such circumstances the court must decide according to "justice, equity and good conscience"; this still

means that it will apply an English rule, if suitable to Indian conditions.

The need, therefore, for a textbook on Contract, in which obscurities are explored, and deficiencies made good, written in collaboration by an Indian and an Englishman, each experts in his own sphere, is obvious. The work under review has for half a century occupied a unique position in Indian legal literature. To your reviewer's generation it was an outstanding example of what a textbook suitable for the judge, the legal practitioner and the advanced student ought to be. It was of the right length; it was easy to find what one sought in it; cases were selected with discretion, and evaluated by sound criteria.

Except where amendments to bring it up to date were necessary, the new authors appear to have preserved every part of the commentary written by the original authors. But they have added references to Indian and English cases decided since the publication of the last edition, discussing many of them, and they have also treated in the same way a number of older English cases ignored by the original authors. This has been made necessary sometimes by a discussion of one of the older English cases in a new Indian decision, such as *Pannalal* v. *Mohanlal*, A.I.R. [1951] S.C. 144, where the distinction between direct and remote damage drawn in *Re Polemis* was approved, *Abdula* v. *Animendra*, A.I.R. [1950] S.C. 15, in which the *Luxor* case was distinguished, impelling the authors to review a number of English decisions on agent's remuneration, and *Dharam* v. *Manik*, A.I.R. [1957] U.P. 33, distinguishing *Clarke* v. *Dunraven* on the question whether a binding contract is created between two persons who act on a proposal coming from a third party. Other older English decisions have been introduced because the new authors rightly felt they were necessary to fill up gaps made evident by new trends in Indian litigation; in this connection one might mention *Rose* v. *Frank* on agreements in restraint of legal proceedings, and *Bell* v. *Lever* on mutual mistake.

New parts of the commentary of outstanding interest and value include several pages on mistake; typical of the new authors' method is the reference to *Solle* v. *Butcher* and the summary of the criticisms of it. Immoral object, frustration, payment under mistake, bailment, and pledge all receive comparatively lengthy new treatment, and the authors are particularly to be congratulated on their discussion of section 65 (obligations arising out of void contracts). New topics of interest dealt with more briefly include choice of law, enforcement of a contract of insurance when the assured has committed suicide, tender of payment, place of payment on a promissory note, avoidance after prevention of performance, and time not of the essence in a contract to purchase a dwelling-house. There has been a skilful reorientation to meet the changes in the type of litigation coming before the Indian courts.

If the original authors had hard things to say about the draftsmanship of the Contract Act, they were even more peppery about the Specific Relief Act, 1877, but their strictures on reliance on the draft New York Code, and elementary instruction masquerading as legislation were accompanied by much helpful comment. To this the new authors have added valuable discussion on specific performance of contracts of sale of land, part performance, rectification, declaratory decrees and mandatory injunctions. Yet the new edition shows no sign of obesity. It deserves to enjoy among lawyers and students of the present and next generation the same regard as earlier editions received from its readers in the past.

The commentary on mandamus is somewhat disappointing, but, inasmuch as a High Court, acting under Art. 226 of the Constitution, claims much wider powers than those granted by section 45 of the Specific Relief Act, it is obviously difficult to write an adequate commentary in the space available. In view of the wide powers accorded by the Hindu Law to the *de facto* guardian, until they were abolished by recent legislation, it would seem possible that the comment, at p. 73, on *Great American Insurance Co.* v. *Mandalal*, A.I.R. [1935] Bom. 353 might be reconsidered in relation to *Subramanyam* v. *Subba Rao* (1948) 75 I.A. 141, cited at p. 81. Though the comment on *Amiraju* v. *Seshama* (1917) 41 Mad. 33, at p. 103 is apt, the bench and the commentator seem to have overlooked the fact that, for a Hindu to threaten suicide to compel his wife and children to execute a release in his favour, is to commit an offence under section 508 of the Indian Penal Code; this seems a clear case of coercion. Two generations of Indian judicial humourists have been grateful for the statement at p. 172 that a custom "*forbidding* a married woman to leave her husband and contract a second marriage without his consent" has been held invalid. In the case cited as an authority for this condemnation, the impugned custom *authorised* feminine waywardness.

ALAN GLEDHILL.

Clarke Hall and Morrison's Law relating to Children and Young Persons: Fifth Edition by A. C. L. MORRISON C.B.E. and L. G. BANWELL: [London, Butterworth and Co. (Publishers) Ltd., 1956. xl and 703 and 36 pp. £4 10s. net.]

THE Editors are well known for their experience in the larger part of this topic, since both of them are or have been chief clerks of Metropolitan Magistrates' Courts. But it is not only Juvenile Court magistrates and probation officers who are in their debt: for this work has come by stages to cover the widest legislative field and includes relevant regulations (and certain departmental

circulars) on the civil aspect. The opportunity has been well taken in this edition to carry the expansion further. The divisions and sections have also been rearranged to advantage, and each of them has been brought up to date—*i.e.*, to the end of April 1956.

Since constructive suggestions are invited in the preface—and indeed there is little or nothing of an opposite character to say of this painstaking and noteworthy edition—the present reviewer offers two.

First, the same publishers put forth in 1948 a work of some 170 pages on the Children Act and the Nurseries and Child Minders Regulation Act of that year. Associated with Messrs Morrison and Banwell in the editorship of it were Miss Wells, barrister of Gray's Inn, who annotated the two statutes, and Colonel Eton, formerly of the London County Council's Education Department, who wrote an introduction. It was, according to its preface, " to some extent a companion volume " to the Clarke Hall and Morrison of that day. In the division of the work now under review which is given to Child Care the introduction and annotations are much shorter. By comparison over the same field, the current edition of Clarke Hall and Morrison loses in comprehensiveness and insight.

Secondly, the annotations of the Statutory Instruments relevant to this division of the book are so attenuated that they furnish little guidance to the range of persons, by no means all lawyers, whom they most affect, *i.e.*, those who are professionally or voluntarily concerned in administering child care within the law. The Administration of Children's Homes Regulations 1951 (S.I. 1951 No. 1217) made by the Home Secretary under S. 15 (4) of the Children Act 1948 and operative since September 1, 1951, pass in the text without any warning that breach of Regulation 11 relating to corporal punishment in a Local Authority or Voluntary Home may have become a misdemeanour irrespective of the law relating to assault or cruelty to children. Since anyone may prosecute, there is a risk that a tired housemother who slaps one of her charges elsewhere than on his hands may be amenable to criminal process launched by a vindictive or disgruntled relative. True it is that the covering departmental memorandum leaves it " open to any Local Authority or Voluntary Organisation " to make it a contractual term of employment that physical punishment is not to be resorted to. And would not this more elastic, less dangerous, and no less effective contractual form of sanction have sufficed to preclude or check corporal punishment on the part of trained workers? Precluded or checked it certainly must be in the case of children in Homes, who *ex hypothesi* arrive there with a background history of an insecure or inadequate home. But are the disgrace of a criminal charge and the possibility of punishment the means best calculated to promote the sense of vocation and enlightenment among those concerned with child care?

This edition is well produced, well printed and well indexed. For changes in the law subsequent to April 1956 a cumulative supplement should suffice for some years to come.

HENRY SALT.

A Source Book of English Law. By A. K. R. KIRALFY, PH.D., LL.M., of Gray's Inn, Barrister-at-Law, Reader in Law at King's College, London. [London: Sweet & Maxwell Ltd. 1957. xx, 440 and (index) 5 pp. 50s. net.]

THIS book is a welcome addition to existing materials for the study of legal history. Though Dr. Kiralfy has let the materials speak for themselves and has done very little by way of commenting on or annotating the texts, he has made his selection with admirable judgment and those translated sources will enable many to make a first-hand acquaintance with sources which through want of time or technical knowledge they would otherwise pass by.

The most controversial part of this book is probably the preface. Dr. Kiralfy speaks plainly and with profound pessimism on the outlook for legal history. Its study is in decline, we are told; it has "flourished over centuries of conjecture and speculation, only to fail within sight of the promised land of knowledge." It is no doubt true that at this moment the genius for great generalisation is not manifestly at work in this field. Nevertheless it is not every day that a Newton or a Darwin arises in his science, and the half century that has elapsed since the death of Maitland is no long time as these things go. The patient and painstaking collection of materials (exemplified by the lifelong labour of Sir William Holdsworth or the series of the Selden Society or indeed by the very work under review) is the condition precedent to the work that will one day place the history of English law in the full context of political, social and economic history. It seems excessively gloomy to deplore the specialisation of scholarship or that the pace is not quicker. It is true that the modern proliferation of statute law, as Dr. Kiralfy points out, is a factor against the future of legal history as an academic discipline. But when the historian looks back to such periods of the dim past as the reigns of Edward I and Henry VIII, it does not seem that spates of legislative activity, though ancient landmarks may be submerged, are phenomena which altogether warrant Dr. Kiralfy's inference. One day the Town and Country Planning legislation will be on much the same footing with the Statute of Uses. But by that time, says Dr. Kiralfy prophetically, "there will be few legal historians to deal with it."

While one may cavil at these speculations, the work itself must be considered entirely acceptable. There is a refreshing range in the selection. Particularly striking is the use made of court

records. These are by no means tedious and repetitive reading and in some fields, as in Chancery, the records are as readable (to say nothing of reliability) as the reports. Stories of human interest are particularly frequent in the records from the prerogative courts, the Admiralty and ecclesiastical jurisdictions. The scope of the book includes not only the growth of substantive law (Dr. Kiralfy has taken into account the existence of other books such as Mr. Fifoot's *History of Contract and Tort* and therefore omitted some leading sources easily found elsewhere) but contains much material on the institutional and procedural side. An understanding of the procedural background is of course vital to a proper appreciation and evolution of the sources themselves. Thus Dr. Kiralfy has selected where possible cases of demurrer or proceedings in error, for here specific legal issues and authoritative rulings are most commonly to be found.

In conclusion, this book is to be thoroughly recommended to all readers of legal history. The beginner will find the outlines clearly defined and the contents within his range provided he uses at the same time a book such as Potter's *Historical Introduction to English Law*. The more advanced reader will find many new and important references. For example, the text of the *In Consimili Casu* clause at pp. 138–139 is followed by an extract from an unpublished Inn of Court Reading and a case from the Parliament Rolls. Occasionally one could wish for a line or comment from Dr. Kiralfy. One or two of his cross headings seem venturesome; *e.g.*, does the case on pp. 146–147, even allowing for the form of action, really merit the heading of "Modern Tort of Deceit"? Misprints appear to be very few: p. 215, T.M. for H.M., p. 326, "Eusque" for "Evesque," p. 397, Bottysham is the name of the parish, p. 406, concluding lines of *Tylney* v. *Tylney*, are the only errors noticed by this reviewer worth recording.

D. E. C. Yale.

The Apportionment of Damages Act, 1956. By R. G. McKerron, Q.C., D.C.L., Professor of Law in Rhodes University. [Cape Town: Juta & Co. Ltd. 1956. 42 pp. and (index) 2 pp. 19s. net.]

This South African Act came into force on June 1, 1956. It is based generally on the English Law Reform (Contributory Negligence) Act, 1945, and Law Reform (Married Women and Tortfeasors) Act, 1935, but with additional provisions. It first abolishes the "all or nothing" rule of the common law of contributory negligence by providing for an apportionment of liability where both parties are at fault "having regard to the degree in which the claimant was at fault in relation to the damages"—in the English Act "having regard to the claimant's share in the

responsibility for the damage." This slight difference in wording may have avoided the possible English difficulty of apportionment of causation (see (1954) *Cambridge Law Journal*, p. 36 at p. 40).

" Fault " includes any act or omission which would before the Act have given rise to the defence of contributory negligence. It is, therefore, much narrower than as defined in the English Act, where it includes negligence, breach of statutory duty or other act or omission which gives rise to liability in tort. In Professor McKerron's view the South African Act would not apply to breach of a statutory duty or to any strict or absolute duty in circumstances excluding negligence. It has, however, been suggested that the presumed intention of the legislature was to include a breach of a statutory duty and that the wording may be wide enough (M. A. Millner in (1956) *South African Law Journal*, pp. 319, 322).

Next, the Act abolishes the " last opportunity " test of causation though it remains relevant as a consideration in arriving at the degree of fault.

The Act does not apply to all actions by the dependants of a deceased person (who in South Africa may claim compensation for the patrimonial loss they suffer by the death). This Professor McKerron regards as a serious defect, but it was done deliberately.

The second part of the Act regulates proceedings against joint wrongdoers and resolves some common law doubts by providing rights of contribution between joint wrongdoers with the same principle of apportionment having regard to the degree of fault. Joint wrongdoers are " two or more persons jointly or severally liable in delict to a third person for the same damage." " Delict " is not defined but is clearly far wider in scope than " fault " as defined in the Act. Furthermore, the rule of joint wrongdoers is expressly made applicable to a statutory liability under the Motor Vehicle Insurance Act 1942.

Professor McKerron in this brief handbook has set out the Act and has dealt with anticipated difficulties. He has made reference to a few South African and English cases. How in practice the Act will be worked out time alone can show, but Professor McKerron's views must be taken into consideration when doubts arise.

D. I. C. Ashton-Cross.

The Sale of Goods. By P. S. Atiyah, b.a., b.c.l.(Oxon), of the Inner Temple, Barrister-at-Law; Sometime Senior Demy of Magdalen College, Oxford; Lecturer in the University of Khartoum. [London: Sir Isaac Pitman & Sons, Ltd. 1957. xxv, 196 and (index) 10 pp. 25s. net.]

Mr. Atiyah's book differs from other extant books on sale of goods in seeking to combine a concise but sufficiently comprehensive account of the modern law with a detailed examination

of every possible obscurity or loophole in the Sale of Goods Act, 1893. It is accordingly short but far from simple. Indeed, it is thoroughly argumentative and, as Professor Gower says in his Foreword, the learned author often reaches unexpected conclusions, with some of which one may quarrel. But then, his object is to stimulate and provoke other views, which he certainly does. Such a book is obviously likely to have both merits and drawbacks.

As to merits, the courageous search for every conceivable difficulty in the subject is certainly a stimulating change from the rather complacent " all-this-is-perfectly-explicable " style of most major monographs. The solutions suggested are always lucidly presented and usually interesting and ingenious. Mr. Atiyah also commendably insists that textbooks on sale should now be based on the provisions of the Act of 1893 and the cases decided thereunder; accordingly, except where ambiguities or lacunae in the Act necessitate it, he spares his readers the citations of earlier case-law and the frequent references to the views of Pothier which have long been traditional in this subject. These are always available at need from *Benjamin's* vast storehouse, but would be cumbersome impedimenta to be carried on the brisk commando campaign which Mr. Atiyah conducts.

As to drawbacks, such a book is never one for the beginner, who will be distracted from the uncontroversial framework by the insistence on difficulties. The author is also apt to be thrown off balance by his own zeal, so that some points receive too much attention and others too little. Occasionally he grapples with problems which seem either imaginary or too improbable to bother with.

Among the interesting things is a suggestion (p. 38) that the condition of good right to sell implied by section 12 (1) of the Act *is* broken by sales under the various exceptions to the maxim *nemo dat quod non habet*, but that the buyer cannot normally sue the seller because he suffers no loss. It would follow that when the property in stolen goods sold in market overt revests in the original owner under section 24 on conviction of the thief, the innocent buyer then suffers loss and can thereupon sue the seller under section 12. It is recognised (p. 17) that section 55 (which enables the parties to negative any " right, duty, or liability " normally implied by the Act) is hardly apt to be called in aid to oust section 6, which bluntly avoids a contract for the sale of specific goods which, unknown to the seller, have already perished—even if he appeared to guarantee their existence, as in *McRae* v. *Commonwealth Disposals Commission* (1951) 84 C.L.R. 377. In the course of the useful discussion of the qualifications of the maxim *caveat emptor* contained in sections 13–15 of the Act (pp. 61–80), some difficulties that may be caused by the evolution of the self-service shop are considered.

The recent developments concerning "fundamental terms" and exemption clauses are adequately dealt with, but in widely separated passages (pp. 34–36, 81–86, 179–184). The distinction between risk and frustration is well made (p. 109) and a serious attempt is made to solve the riddles as to the applicability of the Law Reform (Frustrated Contracts) Act, 1943, to contracts for the sale of specific goods which perish.

But a reviewer's eye is generally jaundiced and with many of the author's views it is difficult to agree. This is especially true of the conclusions deduced from the difficult case of *Rowland* v. *Divall* [1923] 2 K.B. 500 (see pp. 38–42). Counsel's argument there that the buyer could only recover damages, and not the full price for the seller's failure to pass title to the stolen car was *not* based on the applicability of section 11 (1) (*c*) but on the benefit received by the buyer from its use and the impossibility of complete restitution. The judgments of Bankes and Scrutton L.JJ., were concerned only with these grounds. It was Atkin L.J., alone who mentioned section 11 (1) (*c*) and held it inapplicable to breaches of the condition of good right to sell normally implied by section 12 (1) on the ground that the very essence of a contract of sale is the transfer of the property. This leads Mr. Atiyah to cite the case as authority for the propositions, which were never argued, that the condition implied by section 12 (1) cannot be ousted by an express exemption clause although the opening words of the section suggest that it can (p. 42), and that a seller must have the "absolute" title or property in goods to be sold and not merely, say, a possessory title (pp. 8, 42). But, with all respect to Atkin L.J., does the definition of a contract of sale in section 1 (1) as one whereby the seller transfers or agrees to transfer the property in goods (*i.e.*, the general, not a mere special, property—section 62) really mean anything more than that a contract is not one to which the Act applies unless its *object* is to transfer the general property out and out in return for a price, thus distinguishing it from contracts having other objects, such as pledge, mortgage, hire, provision of work and materials, etc? If the parties fail to achieve that object because the seller proves to have no, or only some limited, interest in the goods, then the buyer will have his remedies for breach of the undertakings as to title implied by section 12—but that does not mean that the contract is not one whereby the seller "*agrees to* transfer the property." If this be correct all difficulty about expressly excluding the condition normally implied by section 12 vanishes and the opening words of that section can mean what they say. Why should not a contract be a contract of sale within the Act simply because the seller's offer was "I will sell you this car which I believe to be mine; but if I should prove to have no title to it, you shall not be entitled to sue me for return of the price or damages"? No doubt the buyer would pay a lower price than the car is really worth, but that is irrelevant

except as a recognition that the risk of the car having to be surrendered will be on the buyer from the moment of the contract.

Various other suggestions fail to convince. Does the property in non-necessary goods delivered to an infant under a contract made " absolutely void " by the Infants Relief Act, 1874, section 1, only pass if the price is paid, on the ground that the seller's intention to pass it was dependent on the assumption that it would be paid (p. 33)? Would this not require differing results according to whether or not the seller knew of the buyer's infancy? The distinction made in Part II of the Act between " Transfer of Property as between Seller and Buyer " (sections 16–19) and " Transfer of Title " (sections 21–26) seems perfectly sound in spite of the criticisms at pp. 92–93. The former sections concern the very many cases where the dispute is solely between seller and buyer as to risks and remedies, whilst the latter concern cases where the title to goods is effectively transferred by a person who has no property in them. *Mischeff* v. *Springett* [1942] 2 All E.R. 349, and similar cases prove that the mere passing of property can have consequences other than those listed at p. 95. Are specific goods as to which the seller has broken some condition (*e.g.*, as to their description) for that reason not " in a deliverable state " within section 18, rule 1 (pp. 98–100)? The admission that such interpretation leads to a vicious circle between that rule and section 11 (1) (*c*), and the fact that the immediately following rule 2 of section 18 uses the phrase in an obviously physical sense (*e.g.*, packing, dispatching, severing from the soil, etc.) strongly suggest that it has a similar meaning in section 18, rule 1.

The occasional over-subtlety induced by excessive zeal may be illustrated by the ludicrous suggestion (p. 67) that an umbrella which survives its first, but not its second, shower of rain may be " reasonably fit " for the purpose for which it was bought under section 14 (1); or that a sale by a buyer in possession under section 9 of the Factors Act, 1889 (or section 25 (2) S.G.A., 1893), has different results depending on whether he has a business of his own or not, since the result is to be as if he were a mercantile agent in possession with consent and the latter can only pass a good title if " acting in the ordinary course of business of a mercantile agent " (p. 145). The claim in the Preface to have covered all important points is very largely made out, but a fuller definition of " goods " (pp. 4, 28) would be welcome and the difficult question of who is a mercantile agent is really glossed over (p. 131). Unhappily chosen wording tends to suggest that the Bills of Sale Acts require certain contracts to be in writing (pp. 26–27) and that the seller's invariable duty to make " delivery " (which section 62 defines merely as " voluntary transfer of possession from one person to another ") is synonymous with his much less frequent duty to *despatch* goods to the buyer (pp. 46, 55, 58). The book

is clearly and accurately produced, only five misprints being noted, but more frequent cross-references would be helpful.

Mr. Atiyah's readers will certainly often heartily disagree with him, but they will undoubtedly be forced to re-think their ideas on numerous points—which is what he intended.

J. W. A. THORNELY.

UNIVERSITY LAW SOCIETY 1957–58

THE officers for the year were: President, P. O. Prior (Jesus); Vice-President and Master of the Moots, A. C. Bailey, B.A. (Trinity Hall); Secretary, J. O. Roch, B.A. (Clare); Junior Treasurer, Miss J. V. Willans (Girton). Professor C. J. Hamson, M.A., LL.M., (Trinity) continued in office as Senior Treasurer.

During the visit of the American Bar Association to this country, in the summer months, various parties visiting Cambridge were met by members of the Society who acted as guides to the University; most notable was the day's visit organised by Messrs. Sweet and Maxwell, and Messrs. Butterworths, for a party of American Law Librarians and Teachers of Law. The shepherds and their flock were entertained to lunch in Trinity Hall, the occasion being altogether very congenial. Again in the early part of the Michaelmas Term, a party this time of members of the Inns of Court Students Union, was guided around the sights by the now experienced members of the Society. Both these visits occasioned much pleasure to those lending a guiding hand, and our visitors expressed themselves very well pleased.

Few, it seems, were misled by the title of the first talk of the new Academic year, "The Jealous Mistress," given by Sir Thomas Lund, the Secretary of the Law Society. Those who came expecting a repetition of the subject-matter of last year's paper delivered by M. Marc Ancel on "Le Crime Passionnel," were, it is true, disappointed in that respect, but not by the witty and fluent account which Sir Thomas gave of the work of a solicitor, in the Service of that great Mistress, The Law. Other talks were given in the Michaelmas Term by Sir Theobald Mathew, the Director of Public Prosecutions, in a meeting of the Trinity Hall Law Society to which our members were invited, and Sir Brett Cloutman, V.C., M.C., Q.C., the Senior Official Referee of the Supreme Court, who gave a diverting account of his work as an Official Referee, and of the work of the Department of which he is the head.

The first Moot of the year was presided over by Lord Justice Jenkins. We were hosts to the Dublin University Law Society,

whose members participated as counsel. For Cambridge, Clive Bradley (Clare) and Keith Evans (Downing) argued the case while the Master of the Moots and the Secretary upon the Bench contrived to see that justice prevailed. In spite of this weighting of the scales, honours were even.

As the guests of the Oxford University Law Society, a team from Cambridge comprising J. E. Rowley (Trinity Hall) and J. P. Wall (Jesus) contested before Lord Justice Sellers a problem in both Contract and Tort. They were unable to secure an outright victory.

In the Lent Term the Society held with "Justice" a joint meeting at which Professor Gower of London University, who has recently spent several months in South Africa, spoke to a crowded room on the Treason Trials now proceeding there. After a most convincing address, a collection was taken and a substantial sum sent to the Defence Fund. At the next meeting Judge Gordon Clark, better known to some, perhaps, as Mr. Cyril Hare, author of many popular detective novels, addressed the Society on "The Lighter Side of the County Court." His most entertaining and accomplished talk commanded our attention and our admiration.

At an Annual Dinner of the Society held in the Old Combination Room in Trinity College, a delightful setting, Lord Justice Sellers, M.C. and Sir Edwin Herbert, a Past-President of the Law Society, were among the guests. The convivial proceedings were only broken up at a very late hour by the appearance of sleepy-eyed waiters to clear away the remains.

Other speakers still to address the Society at the time of writing, are Lord Denning on "The Right Standard of Conduct," Professor Freund, on "Practice before the Supreme Court of the United States," and Gerald Gardiner, Q.C. on "Penal Reform."

One other Moot is to be held, before Lord McNair, sitting as an Arbitrator, in an International Law Problem set by him. It is hoped that a team from Edinburgh University Law Society will contest the issue.

PETER PRIOR.

Officers for the year 1958–59 were elected as follows:

President: D. J. C. Dunstone (*Clare*).
Vice-President & Master of Moots: Miss J. V. Willans (*Girton*).
Secretary: J. P. Wall (*Jesus*).
Junior Treasurer: D. F. Wheatley (*Queens'*).